VOLUME V.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 28

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN SECRETARY OF THE INTERIOR, PETITIONER

vs.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, ET AL.

THE VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

vs.

THE FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC POWER COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1952
CERTIORARI GRANTED MAY 5, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. —

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

vs.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

No. —

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

vs.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Received March 4, 1952. Office of the Clerk, Supreme Court, U.S.

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1 Proceedings in the United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

On petition for review of an order of the Federal Power Commission

April 27, 1951, petition for review is filed and the cause is docketed.

NOTE.—The petition for review appears at Page 1 of Part I of Petitioners' Appendix and is, therefore, omitted here.

April 27, 1951, notification of the filing of the petition, together with a copy of the petition for review, mailed to Federal Power Commission at 1800 Pennsylvania Avenue, Washington, D. C., and Virginia Electric and Power Company at Electric Building, Richmond, Virginia.

April 30, 1951, the appearance of T. Justin Moore and Patrick A. Gibson is entered for the respondent, Virginia Electric and Power Company.

May 1, 1951, the appearance of Gregory Hankin is entered for the petitioner.

May 2, 1951, the appearance of Bradford Ross, General Counsel, and Willard W. Gatchell, Assistant General Counsel, is entered for the respondent, Federal Power Commission.

May 5, 1951, transcript of record is filed.

2 In the United States Court of Appeals for the Fourth Circuit

No. 6273

THE UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Motions for continuance, enlargement of time for designation of parts of the record to be printed, and permission to file brief in excess of 50 pages

Comes now the Petitioner, United States of America on the relation of Oscar L. Chapman, Secretary of the Interior, and moves this Honorable Court to continue the above-entitled cause to the October Term, 1951, to enlarge the time to September 1, 1951, within which the Petitioner may furnish the Respondents with a statement of the parts of the record which the Petitioner proposes to have printed as an appendix to the brief, and to permit the parties herein to file briefs in excess of 50 pages in volume.

As reasons for this Motion the Petitioner assigns as follows:

1. The Pefition for Review in this case was filed on April 27, 1951.

2. The Respondent Federal Power Commission transmitted the transcript of the record to the Clerk of the Court, and it was filed by him, on May 5, 1951. The Petitioners have not as yet had an opportunity to examine the transcript, as filed, in order to ascertain whether all pertinent documents are included therein.

3. The Clerk of the Court informed the parties that the case will go on the docket for argument at the June Term which is to commence on June 11, 1951 and that the Petitioner's Brief and Appendix should be filed on or before May 22, 1951.

4. The record in this case consists of a transcript of over 3,750 pages and 94 exhibits. It would be physically impossible to separate out the portinent material to be included in the Appendix to the Brief, to have the parts constituting the Appendix designated, and then to have the Brief written and printed with specific references to the transcript or Appendix by May 22, 1951 or by any other date in time for the argument of this cause during the June Term.

5. The questions presented by the Petition for Review are important, and a decision thereon may affect the entire power program of the United States. Therefore, it is important that all questions of law and fact should be carefully and thoroughly briefed, and this is another reason why the Petitioner's Brief cannot be filed within time for argument during the June Term.

6. The facts stated in paragraph 5 hereof also constitute the reason for our request that counsel be permitted to file briefs in excess of 50 printed pages in volume. It is respectfully suggested that the main brief be limited to 100 pages, with permission to file a supplemental brief, as was done in the case of United States v. Appalachian Electric Power Company (C. C. A. 4th) 107 F. (2d) 769.

7. Counsel for the Petitioner herein is authorized to state that

the Petitioners Virginia REA Association, et al. (No. 6274) join in this Motion.

8. Counsel for the Petitioner herein is authorized to state the Respondent Federal Power Commission is not opposed to the extension of time requested herein.

WHEREFORE the Petitioner prays that this Motion should be granted.

Respectfully submitted.

Gregory Hankin,
GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior.

4 In the United States Court of Appeals for the Fourth Circuit

No. 6273

THE UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Notice

BRADFORD ROSS, Esq.,
General Counsel, Federal Power Commission.

JUSTIN MOORE, Esq.,
General Counsel, Virginia Electric and Power Company.

SIRS: Notice is hereby given that I shall present the foregoing Motions to the Court at its Special Term to be held on May 11, 1951 in the City of Baltimore, Maryland.

Gregory Hankin,
GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior.

5 In the United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Objection by Virginia Electric and Power Company to the motion for continuance, etc.

Comes now the Respondent Virginia Electric and Power Company (herein called the Licensee) in response to the motion for continuance and for other relief made on behalf of the Secretary of the Interior (herein called the Secretary), and respectfully presents this response to the motion.

I

6 The Licensee objects to continuance of the case beyond the June, 1951, term of the Court. The grounds of the Licensee's objection are as follows:

1. On January 26, 1951, the Federal Power Commission issued its Order which the Secretary's Petition to Review seeks to set aside. The Order issued to the Licensee a license under the Federal Power Act to construct a hydroelectric project at Roanoke Rapids, North Carolina.

The license calls for construction by the Licensee of a dam and hydroelectric generating plant of 91,000 kilowatts capacity, at an estimated cost of approximately $27,000,000, to provide power which by the time of completion will be urgently needed to meet increasing system loads and defense needs in the area served by the Licensee's interconnected utility system.

On February 19, the Secretary filed with the Commission his Petition for Rehearing. The Petition was denied by the Commission on March 1.

Practically at the end of the sixty-day period provided by statute for seeking review of the Commission's Order, the Petition in this case was filed on April 27. Three months had passed since the Decision complained of. The timing was apt for missing the June term, which would add many months to the more than two years delay already sustained in this proceeding. With

the prompt transmission of the transcript of the record to this Court by the Commission on May 5, however, the case is now docketed to be heard at the June term.

7 The Secretary's Brief is due on May 22. By that date, the Secretary will have had within four days of four months since issuance by the Commission of the Decision of which the Secretary complains. There is no reason why any reviewable question which it may be claimed on behalf of the Secretary may be found in the case may not be adequately stated within that period of time. For more than two years the Secretary has opposed the issuance of the license. The proceedings in the case during most of that time have been devoted to trial of his objections.

Even though the Secretary's Petition for Review makes numerous complex contentions contrary to findings of the Commission which are fully supported by substantial evidence and therefore not open to review, and even though the Secretary's presentation could be much abbreviated by confining it to such reviewable question as may arise, there is no reason why the Secretary should not be in position by the appointed time to state fully all objections he conceives. He has already stated them fully and frequently during the progress of the case before the Commission.

Briefs and memoranda already filed by the Secretary stating his objections to issuance of the license include:

April 4, 1949 (7 pages) Petition to Intervene and supporting Memorandum (R. 5199).

April 25, 1949 (7 pages) The Secretary's second Petition to Intervene (R. 5178).

8 May 12, 1949 (60 pages) The Secretary's Motion to Dismiss or Deny the Application and supporting Brief (R. 5269).

August 31, 1949 (169 pages) The Secretary's Brief on the Record Made Before the Examiner, with Proposed Findings and Conclusions.

October 3, 1949 (107 pages) The Secretary's Reply Brief.

August 30, 1950 (208 pages) The Secretary's Brief on the Record made in the Reopened Hearing.

December 22, 1950 (247 pages) The Secretary's Exceptions and supporting reasons.

January 11, 1951 (74 pages of the Transcript) the transcript of the oral argument for the Secretary (T. 3538, 3761).

February 19, 1951 (48 pages) the Secretary's Petition for Rehearing.

May 1951 (32 pages) The Secretary's Petition for Review.

2. The proceedings upon the Licensee's application for the license have already been unduly prolonged in consequence of the Secretary's objections and by numerous extensions of time granted at his request. The delays which have been thus inflicted, quite aside from the lengthy trial of unmerited contentions by the Secretary, include:

June 16, 1949: timing of Briefs requested by the Commission's Staff and the Licensee as July 29, and by the Secretary as September 16; set at August 15 (T. 2357–8) with Reply Briefs September 9 (T. 2360).

July 26, 1949: at request of the Secretary time extended for Briefs from August 15 to September 1, and for Reply Briefs from September 9 to September 23.

September 16, 1949: at request of the Secretary time extended for Reply Briefs from September 23 to September 30.

April 6, 1950: upon the Commission's own motion after application by the Secretary for reopening of the hearing, time for filing exceptions extended from April 11 to June 5. (R. 5523)

April 27, 1950: on application of the Secretary, order entered reopening the hearing to permit introduction of evidence which the Secretary alleged he could not have presented at the concluded hearing, and postponing the filing of exceptions until the further decision of the Examiner. (R. 5584)

June 15, 1950: on motion of the Secretary, order entered withdrawing the limitation of the reopened hearing to newly discovered evidence. (R. 5606)

July 19, 1950: on motion of the Secretary, time extended for Briefs on the reopened hearing from July 25 to August 2. (R. 5625)

July 26, 1950: on application of the Secretary, time extended for Briefs from August 2 to August 9.

August 4, 1950: on application of the Secretary, time extended for Briefs from August 9 to September 1.

December 1, 1950: on motion of the Secretary, time for filing exceptions extended from December 5 to December 22. (R. 5714)

Throughout the case, neither the Commission's counsel, the Licensee, nor intervenors who supported the license have requested any extensions of time other than minor adjustments of hearing dates to avoid conflicts during the long trial.

3. There is urgent need for early determination of this controversy in order to gear construction of the licensed project into the planning, financing, and execution of the Licensee's construction program currently aggregating over $40,000,000 per year, required by expanding loads and defense needs. To meet these

demands, construction for expansion of generating capacity must begin well in advance of the date when the loads must be carried. With delay in construction under the license, less economic facilities, steam plants consuming fuel, must be proceeded with.

The need for early conclusion of this long contest was forcefully stated by the Commission's Chief Presiding Examiner in his Supplemental Decision of November 15, 1950, in these terms:

"Little, if anything, in the way of basic facts, was added to the record by the hearing held this year. Relatively few, if any, material, basic facts are in dispute in the case."

* * * * *

"The completed application for license to construct the
11 power plant and dam at Roanoke Rapids was filed April 6, 1949. The contest here has been greatly protracted. In the present grave emergency, the Government looks to private industry for cooperation and support and, where practicable, for increased investment of private capital for the immediate strengthening of the national economy and security. In this case, an experienced and successful private utility company is ready, willing and able to proceed under Federal license and regulation with the development and utilization of idle and wasting natural resources at Roanoke Rapids without aid of the Federal Treasury and substantially in harmony with the Army's comprehensive plan. Its proposed project has been approved by the Army Engineers.

* * * * *

"Further delay in the construction of the Roanoke Rapids project would prolong unnecessarily the wastage of the water of the Roanoke River. Such continued wastage could not, it is thought, be justified now in the face of the pending application, the established need for additional power in the area and the general need for increased effort and speed in the development and employment of idle water resources in the interest of the country's economy and safety."

4. Further delay is unwarranted, is injurious to the Licensee, and is contrary to the public interest. The term of the license is now running. Earliest development of generating capacity is of highest priority. Prosecution of construction at this time by the Licensee would lie under the cloud of the prayer to annul the order of the Commission issuing the license. Failure to pros-
ecute construction at this time would default the Licensee
12 in its obligations to the United States under the terms of the license, would injure the Licensee, and would be contrary to the public interest. Early determination in this case is desirable in the interest of justice and of the public welfare.

II

The Licensee objects that the averments on behalf of the Secretary as to the task of designating and printing the parts of the record to be printed as an appendix to his Brief give no reason to continue the case beyond the June term. The Secretary has, and has received all during the progress of the case, copies of the papers comprising the transcript of the record, inclusive of orders, exhibits, and the transcript of the testimony. The Secretary should long since have known what parts of the record he relies on. There is no reason for any enlargement of the time for designation. As to printing, if the physical task can not have been completed by the time the Brief should be filed, the Court may permit some readier duplication or the filing of existing copies in the urgent interest of early and orderly disposition of the case.

III

The Licensee does not oppose some fair adjustment of timing which would not defer hearing of the case be-
13 yond the June term. As to the briefs, since the Secretary requests enlargement of the 50-page limit, the Licensee objects that, for timing for the June term, the 15 days now available under Rule 10 to the Licensee should not be diminished. As to designation, the Licensee's task of selecting and printing in response to the Secretary's designation can not practicably begin until after the Secretary's designation is received. From the averments on behalf of the Secretary, it appears that he proposes to designate a voluminous selection from the record. Therefore, for timing for the June term, the date for the Secretary's designation, if any enlargement is justified, should not be so deferred as to diminish the 22-day interval now available to the Licensee under Rule 10 for selection and printing in response.

IV

The Licensee objects that in any event the times set for the respective briefs and selection and printing of parts of the record in appendices should be equitable in the division between the parties of the time to be available for such purposes. Other than the assertions in the Petition to Review, nothing could be more unreasonable than is the plea of the Secretary here that he
14 should have all spring, summer, and autumn to prepare his Brief and the Commission and the Licensee should have 15 days for reply.

V

The Licensee does not object to the requested 100 page limit on the briefs, but objects that the Court's consideration of such reviewable questions as may arise in this case should not be burdened with supplemental briefs. This is not the forum for retrial of the facts heard before the Commission through 3750 pages of transcript.

The Licensee prays that whatever limit for briefs be given the Secretary be likewise given the Licensee.

VI

The Licensee prays that this case and Case No. 6274, in which the Virginia REA Association, and others, have petitioned to review the same order of the Commission, may be briefed together and heard in oral argument together.

Respectfully submitted.

T. JUSTIN MOORE,
PATRICK A. GIBSON,
Counsel for the Respondent,
Virginia Electric and Power Company.

HUNTON, WILLIAMS, ANDERSON, GAY AND MOORE,
1003 Electric Building,
Of Counsel.

Dated at Richmond, Virginia, May 9, 1951.

15 In the United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

No. 6274

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Motion of Carolina Power & Light Company for leave to Intervene

Carolina Power & Light Company moves for leave to intervene in these causes, the nature of its interest and the grounds upon which intervention is sought herein being as follows:

I. That in the proceeding before the Federal Power Commission entitled "In the Matter of Virginia Electric and
16 Power Company, Project No. 2009," to which these appeals relate, Carolina Power & Light Company on May 2, 1949 filed its Petition to Intervene; that its Petition to Intervene was granted by an order of the Federal Power Commission dated May 6, 1949; and that thereafter it appeared and participated as intervenor in the proceeding before the Federal Power Commission.

II. That the grounds upon which intervention is sought are those stated as follows in the above mentioned Petition to Intervene filed by Carolina Power & Light Company with the Federal Power Commission:

"1. That it is a public service corporation created and existing under the laws of the State of North Carolina, is engaged primarily in the business of generating and distributing electricity in North Carolina and South Carolina, and is the owner of a Federal Power Commission licensed hydroelectric project (License No. 432–North Carolina) located on the Pigeon River in North Carolina near the Tennessee State line.

"2. That its system is interconnected with the systems of Virginia Electric and Power Company, Appalachian Electric Power Company, and Duke Power Company, and with other private and public utilities, one of the points of interconnection with the system of Virginia Electric and Power Company being near Roanoke Rapid, North Carolina.

"3. That it has a contract for the interchange of electrical energy with Virginia Electric and Power Company and is a potential customer for power and energy to be generated at the proposed Roanoke Rapids project.

"4. That this petitioner is the owner of an undeveloped water power site in North Carolina on the Yadkin-Pee Dee River, which was recommended for development by the Commission in House Document No. 652, 78th Congress, 2d Session, and
17 therefore is directly interested in the position urged by the Secretary of the Interior that such projects are withdrawn from the licensing power of the Commission. If such position of the Secretary of the Interior is sound, then this petitioner may be prohibited from developing said water power site.

"5. That this petitioner asks that it be permitted to intervene in support of the application of Virginia Electric and Power Company for a license and in opposition to the positions taken in the intervention petition of the Secretary of the Interior, so that it may present in this proceeding the view that neither recommendations by the Commission of the type made in House Document No. 650, 78th Congress, 2d Session, nor Congressional action of the type contained in the Flood Control Act of 1944 (58 Stat. 887) withdraws undeveloped water power sites from the jurisdiction of the Commission."

Wherefore, Carolina Power & Light Company, through its council moves for leave to intervene in these causes.

Respectfully submitted,

CAROLINA POWER & LIGHT COMPANY,

By

CHARLES F. ROUSE,

Raleigh, N. C.,

DAVID W. ROBINSON,

908 Palmetto Building, Columbia, S. C.,

Counsel for Movant,

Carolina Power & Light Company.

MAY 7, 1951.

18 In the United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

No. 6274

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Statement on motion for continuance, and motion for consolidation of causes and for permission to file enlarged brief

Comes now the Respondent Federal Power Commission, through its counsel, and states to the Honorable Court that it does not offer objection to the motion of the Petitioner United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior, for additional time within which to designate the parts of the record which the Petitioner proposes to print, as an appendix to its brief, but this Respondent respectfully suggests to the Court that if additional time is allowed for this purpose, there should be a reasonable extension of time allowed for the filing of a brief by this Respondent.

19 The Respondent Federal Power Commission respectfully moves this Honorable Court to consolidate the above-entitled causes.

The Respondent Federal Power Commission respectfully further moves this Honorable Court to permit all parties in the above-entitled causes to file main briefs of not in excess of one hundred pages.

As reasons for the above motions, this Respondent states as follows:

(1) Both of the above-entitled causes seek court review of the same orders of the Respondent Federal Power Commission and the consolidation of the two causes will save the time of the Court and counsel in the presentation, consideration, and disposition of the issues.

(2) The issues raised by the petitions for court review are not numerous but require full presentation for the proper understanding of the Court, and it does not appear likely that the position of this Respondent can be stated adequately in a brief of much less than one hundred pages.

(3) Counsel for the Petitioner United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior, has advised counsel for this Respondent that he offers no objection to a reasonable time for filing a brief on behalf of this Respondent or to the filing of a brief on behalf of this Respondent of not over one hundred pages.

Wherefore this Respondent prays that the above motions be granted.

Respectfully submitted.

Bradford Ross,
BRADFORD ROSS,
General Counsel,
WILLARD W. GATCHELL,
Assistant General Counsel,
Counsel for Respondent,
Federal Power Commission.

WASHINGTON, D. C., *May 9, 1951.*

20 NOTICE

To GREGORY HANKIN, Esquire,
Counsel for the Petitioner United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior;
To ROBERT WHITEHEAD, Esquire,
Counsel for Virginia REA Association, et al.;
To T. JUSTIN MOORE, Esquire,
General Counsel, Virginia Electric and Power Company;

SIRS: Please take notice that the foregoing motions will be presented to the Court at the special term to be held on May 11, 1951, in the City of Baltimore, Maryland.

Bradford Ross,
BRADFORD ROSS,
General Counsel,
WILLARD W. GATCHELL,
Assistant General Counsel,
Counsel for Respondent,
Federal Power Commission.

WASHINGTON, D. C., *May 9, 1951.*

21 *Argument of cause on motion to continue*

May 11, 1951 (Special May term, 1951) cause came on to be heard, together with No. 6274, on the motion for continuance, etc., before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Order continuing causes, etc., filed and entered May 11, 1951.

United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

No. 6274

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

On petitions for review of an order of the Federal Power Commission

These causes came on for hearing on the motion of petitioners to continue the above cases from the June term of the Court to its October term, and was argued by counsel.

On consideration whereof, it is now ordered by this court
22 that the above entitled cases be, and they are hereby consolidated and continued from the June term to a special term of the Court to be held in Richmond, Virginia, on September 4, 1951; that the time within which petitioners may furnish respondents with a statement required by section 3 of Rule 10 be extended to July 10, 1951; that the petitioners are given leave to file briefs not exceeding 150 printed pages, but not more than 50 pages to be devoted to a reply brief; the Federal Power Commission is given leave to file a brief not exceeding 100 pages, and the Virginia Electric and Power Company is given leave to file a brief not exceeding 75 pages. Main brief for petitioners to be filed on July 10, 1951. Reply brief for petitioners to be filed on August 15, 1951. Briefs for respondents to be filed on August 1, 1951.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

May 11, 1951.

23 In the United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

No. 6274

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Motion of Appalachian Electric Power Company for leave to intervene

Appalachian Electric Power Company moves for leave to intervene as a party in these causes, and in support thereof states:

"1. That in the proceeding before the Federal Power Commission entitled "In the Matter of Virginia Electric and Power Company, Project No. 2009," to which these appeals relate, Appalachian Electric Power Company, on May 2, 1949, filed its Petition to Intervene; that such petition to Intervene was granted by Order of the Federal Power Commission, dated May 6, 1949; and that thereafter Appalachian Electric Power Company participated as a party to such proceeding in the introduction of the evidence, cross examination of witnesses, the filing of briefs and the presentation of argument before the Commission.

24 "2. That the nature of its interest in these causes and the grounds upon which intervention is sought herein are further stated in the above-mentioned Petition to Intervene, a copy of which Petition, together with a copy of the Order of the Federal Power Commission granting such Petition, are listed as being included at pages 5196 et seq. and page 5255, respectively, of Volume 12 of the certified copy of the record filed in this Court by the Federal Power Commission. For the convenience of the Court a copy of said Petition to Intervene and said Order of the Federal Power Commission are also attached hereto as Exhibits A and B, respectively."

Wherefore, Appalachian Electric Power Company, through its counsel, moves for leave to intervene in these causes, to be accorded all rights of a party therein, including the right to file briefs and present argument, and, since it is advised that by Order of the Court dated May 11, 1951, briefs for the respondents are to be filed by August 1, 1951, that it be permitted to file a brief, conforming to the applicable requirements of Rule 10 of the Court's Rules, on or before that date.

Respectfully submitted.

APPALACHIAN ELECTRIC POWER COMPANY,
By HERBERT B. COHN,
30 Church Street, New York, New York,
Of Counsel for Movant,
Appalachian Electric Power Company.

MAY 17, 1951.

25 MAY 17, 1951.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion for Leave to Intervene, by mailing a copy thereof, postage prepaid properly addressed to each of the following persons:

III

The Commission's Order Setting Hearing in the above captioned matter, dated March 22, 1949, states that the Secretary of the Interior has notified the Commission that his department will oppose the application filed herein by Virginia Electric and Power Company, and that one ground for its opposition is:

"That since Congress has approved the plan of the Army Engineers for development of the Roanoke River Basin which includes the Roanoke Rapids site, this approval constitutes a
28 determination by Congress that the sites studied and recommended for development by the Army Engineers should be developed by the United States itself, and thus the Commission lacks jurisdiction to entertain the application."

The Commission's Order lists, among the issues to be considered at the hearing, "the question of the Commission's authorization under the Federal Power Act to entertain the application for license herein" and "the question of whether the development of the Roanoke Rapids site should be undertaken by the United States itself."

IV

Petitioner is advised and believes that the reference in the quoted statement in paragraph III hereof to "the plan of the Army Engineers for development of the Roanoke River Basin" refers to the study and report by the Chief of Engineers, United States Army, which is included in House Document No. 650, 78th Congress, 2d Session. Appendix A hereof shows that a substantial portion of the area which is the subject of such study and report, and which is covered by the so-called general plan for the comprehensive development of the Roanoke River Basin, is in the territory presently being served by Petitioner. Appendix A further shows Petitioner's hydroelectric generating plants in and near such area. Petitioner contemplates the construction of additional hydroelectric generating plants in such area and other areas in its territory and the purchase and distribution of additional electric energy generated by hydroelectric generating plants constructed by others in such areas.

29

V

Petitioner's position on "the question of the Commission's authorization under the Federal Power Act to entertain the application for license herein" is that neither the recommendation of the Chief of Engineers of the Army relating to the general plan for the Roanoke River Basin, nor the action taken by this Com-

mission with respect thereto, nor the Congressional "approval" of such general plan in the Flood Control Act of 1944, was intended to or could constitute a binding determination by the Army Engineers, this Commission or the Congress that all of the sites proposed for development under such general plan should be developed by the Federal Government or deprive this Commission of jurisdiction to consider and grant applications by private utility companies for licenses to construct, maintain and operate hydroelectric developments in the Roanoke River Basin.

Petitioner's position on "the question of whether development of the Roanoke Rapids site should be undertaken by the United States itself" is that the Commission should not recommend that development of the Roanoke Rapids site be undertaken by the United States; and that, insofar as the proposed projects for such site have as their sole or predominant purpose the generation of electric power, any attempt to authorize the construction of any such project by the United States would exceed the powers of Congress and that this Commission could not, therefore, validly refuse to grant the application herein on the ground that development of the Roanoke Rapids site should be undertaken by the United States.

30

VI

Petitioner is advised and believes that, if the Commission, in its determination of the issues raised in the instant proceedings, were nevertheless to accept the contention that, by reason of the recommendation of the Chief of Engineers of the Army relating to the general plan for the Roanoke River Basin or the action taken by this Commission with respect thereto or the Congressional "approval" of such general plan in the Flood Control Act of 1944, the Commission has been deprived of jurisdiction to consider and grant the instant application, or were to take the position that it might properly deny the application on the ground that the development of the Roanoke Rapids site should be undertaken by the United States, such action by the Commission in the instant proceedings might later be held to bind or otherwise prejudice Petitioner if and when Petitioner should desire to construct additional hydroelectric generating plants at other sites in the Roanoke River Basin area or other areas or to purchase and distribute electric energy generated by hydroelectric plants constructed by others in such areas; and, further, that any such determination might result, to the substantial detriment of Petitioner, in the construction of hydroelectric generating plants and the transmission, distribution and/or sale of electric energy by others in competition with Petitioner. Petitioner, therefore, believes that its rights may be directly and materially

affected by the Commission's action in the instant proceedings; that it might, in practical effect, be bound by such action;
31 and that its rights will not be adequately represented and cannot be adequately protected unless Petitioner is permitted to intervene and participate as a party in the instant proceedings.

VII

Petitioner's intervention and participation as a party in the instant proceedings will serve to protect the interests of its security holders and of the consumers it serves, is in the public interest within the meaning and purpose of Section 308 (a) of the Federal Power Act, and is necessary and appropriate to the administration of the Federal Power Act and in the public interest within the meaning and purpose of Section 1.8 (b) of the Rules of Practice and Procedure of the Commission.

VIII

Wherefor, for the above stated purposes and reasons, Petitioner requests that it be permitted to intervene and participate as a party in the instant proceedings.

Respectfully submitted.

APPALACHIAN ELECTRIC POWER COMPANY,
By Graham Claytor,
GRAHAM CLAYTOR,
Vice President,
30 Church Street, New York 8, New York.

Name and post office address of persons to whom correspondence or communications should be addressed: Graham Claytor, Vice President, Appalachian Electric Power Company, 30 Church Street, New York 8, New York.

32 STATE OF NEW YORK,
County of New York, ss:

Graham Claytor, being first duly sworn, deposes and says that he has duly executed the attached Petition for and on behalf of the Company named; that he is the vice president of such Company; that he is authorized, on behalf of said Company, to execute and file such Petition and to make this verification; that he has read the Petition and knows the contents thereof; and that to the best of his knowledge, information and belief the statements therein are true.

Graham Claytor.
GRAHAM CLAYTOR.

TERRITORY SERVED BY
APPALACHIAN ELECTRIC POWER COMPANY

- 132 KV TRANSMISSION LINE – SINGLE CIRCUIT
- 132 KV TRANSMISSION LINE – DOUBLE CIRCUIT
- OTHER HIGH TENSION LINE
- COMMUNITY SERVED BY COMPANY

ELECTRIC GENERATING PLANT –
- STEAM
- HYDRO

HYDRO ELECTRIC GENERATING PLANT OF KANAWHA VALLEY POWER COMPANY

SCALE OF MILES
10 0 10 20 30 40

OHIO

WEST VIRGINIA

KENTUCKY

VIRGINIA

TENN.

NORTH CAROLINA

PHILIP SPORN PLANT (Lines & Plant Under Construction)

LINES OF THE OHIO POWER COMPANY

LINES OF KENTUCKY AND WEST VIRGINIA POWER COMPANY, INCORPORATED

LINES & PLANT OF KENTUCKY AND WEST VIRGINIA POWER COMPANY, INCORPORATED

HAZARD (Lothair)

KINGSPORT

LINES & PLANT OF KINGSPORT UTILITIES, INCORPORATED

INTERCONNECTION WITH VIRGINIA ELECTRIC & POWER COMPANY

INTERCONNECTION WITH TENNESSEE VALLEY AUTHORITY

INTERCONNECTION WITH CAROLINA POWER & LIGHT COMPANY

INTERCONNECTION WITH DUKE POWER COMPANY

Under Construction

Ohio River

Kanawha River

New River

Greenbrier River

Kentucky River

Big Sandy River

Tug Fork

Levisa Fork

Guyandotte River

Coal River

Elk River

Gauley River

Holston River

South Fork

Clinch River

Powell River

Kanawha Falls

Hinton Sub

Buck

Bluefield

Glen Lyn

Logan

Gauley Bridge

Oak Hill

Thurmond

Meadow Bridge

Quinnimont

Sprague

Beckley

Raleigh

Prince

Layland

Mt. Hope

Fayetteville

Kincaid

Nuttallburg

Kaymoor

Cliffton

Nallen

Quinnesec

Anjon

Charmco

Rupert

Springdale

Hico

Ansted

Sharples

Whitesville

Highcoal

Danville

Madison

Peytona

Eskdale

Leewood

Page

Dorothy

Eunice

Amigo

Long Branch

Knight

Dry Creek

Prosperity

Cranberry

Harper

Eccles

Lookout

Kayford

Kopperston

Slab Fork

Stotesbury

Winding Gulf

Princewick

Sullivan

Daniel

Flat Top

Odd

Mabscott

Pineville

Caretta

Scarbro

Rhodell

Maben

Hanna

Crab Orchard

Beaver Creek

Glen Jean

Fayette

Oak Hill

Fairlain

Kenna

Ripley

Evans

Mt. Alto

Cottageville

Millwood

Walton

Sutton

Elkview

Blue Creek

Clendenin

Dickmore

Lismores

Cedar Grove

Chelyan

Malden

Dunbar

Belle

Nitro

Winfield

Hurricane

Milton

Ona

Barboursville

Huntington

Ashland

Catlettsburg

Kenova

Wayne

Crum

Wilsondale

Ceredo

Lavalette

Westmoreland

Griffithsville

Yawkey

Woodville

Hamlin

Salt Rock

Scott Depot

Poca

Putney

Ashford

Alum Creek

Glasgow

Cross Lanes

Gauley Bridge

Amsted

Nallen

Lookout

Quinnesec

Anjon

Charmco

Rupert

Springdale

Meadow Bridge

Layland

Prince

Mt. Hope

Fayetteville

Kincaid

Nuttallburg

Kaymoor

Cliffton

Thurmond

Oak Hill

Subscribed and sworn to before me this 2d day of May 1949.

[SEAL] HARRY E. HAMILTON,
Notary Public.

Harry E. Hamilton, Notary Public, State of New York, No. 60–1650850, qualified in Westchester County. Certificate filed with New York County Clerk and Register. Term expires March 30, 1951.

33 CERTIFICATE OF SERVICE

MAY 2, 1949.

I hereby certify that I have this day served the foregoing Petition to Intervene, by mailing a copy thereof, postage prepaid, properly addressed to each of the following persons:

T. Justin Moore, Esquire, 1003 Electric Building, Richmond, Virginia, Of Counsel for Applicant, Virginia Electric and Power Company. Hon. Mastin G. White, Solicitor, Department of Interior, Washington, D. C. Willard W. Gatchell, Esquire, William J. Costello, Esquire, Staff Counsel, Federal Power Commission, Washington, D. C.

Herbert B. Cohn,
HERBERT B. COHN,
30 Church Street, New York 8, N. Y.,
Of Counsel for Appalachian Electric Power Company.

34

35

EXHIBIT B

United States of America Federal Power Commission

Before Commissioners: Claude L. Draper, Acting Chairman; Thomas C. Buchanan and Leland Olds

MAY 6, 1949.

Project No. 2009

IN THE MATTER OF VIRGINIA ELECTRIC AND POWER CO.

ORDER UPON PETITIONS TO INTERVENE

Petitions to intervene have been filed in the above proceeding on behalf of the Secretary of the Interior, Appalachian Electric Power Company, Carolina Power & Light Company, and Virginia REA Association with its eleven Electric Cooperatives. Objection to such intervention by the Secretary of the Interior was filed by the applicant which also informally advised the Commission's staff of its objection to intervention by the Virginia REA Association and its members.

In acting upon this application for license under Part I of the Federal Power Act, the Commission of necessity must consider the public rights and interests in the development of the water resources involved, and, of course, it is not necessary to admit the Secretary of the Interior as a formal party since his assistance as a coordinate Federal agency is always welcomed in order to secure full presentation of the issues involved. The Virginia REA Association, with its members, represent consumers in the area which may be directly affected.

The Commission finds: Formal intervention by the Secretary of the Interior is unnecessary but admission of the other petitioners may be in the public interest.

The Commission orders:

(A) The petition of the Secretary of the Interior for formal intervention is denied; provided that such denial shall not be construed as curtailing or otherwise affecting the privilege of the petitioner as head of one of the coordinate departments of the United States, to introduce evidence relevant and material to the issues in the proceeding as set forth in the Commission's order of March 22, 1949, to make oral argument, and to file briefs.

(B) The other petitions to intervene are hereby granted; provided, however, that nothing in this order shall be construed as

recognition by the Commission that any of said petitioners may be aggrieved by any order of the Commission in this proceeding.

By the Commission:

Leon M. Fuquay,
LEON M. FUQUAY,
Secretary.

Date of Issuance: May 9, 1949.

36 *Order amending order of May 11, 1951*

[Filed May 21, 1951.]

United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

No. 6274

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

In the order of this Court entered in the above entitled cases on May 11, 1951, the Federal Power Commission was inadvertently given leave to file a brief not exceeding 100 pages; the said order is therefore amended to read that the "Federal Power Commission is given leave to file a brief not exceeding 75 pages."

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MAY 19TH, 1951.

37 In the United States Court of Appeals for the Fourth Circuit

Nos. 6273 and 6274

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

On Review of an Order of the Federal Power Commission

Petitioners' statement on the petitions of the Carolina Power and Light Company and the Appalachian Electric Power Company for leave to intervene

The Petitioners in the above entitled causes do not oppose the petitions of the Carolina Power and Light Company and the Appalachian Electric Power Company for leave to intervene, provided that

(1) These intervenors are required to include their written arguments in the briefs to be filed by the respondents herein; or

(2) If the intervenors are permitted to file their own briefs, the length of such briefs should be specified, and the petitioners herein should be permitted to expand their reply brief by the same number of pages; and

(3) If the intervenors are permitted to participate in the oral argument, the time allowed to the Petitioners should equal that allowed to the Respondents and the intervenors in their behalf.

Counsel for the Petitioners, Virginia REA Association et al., joins in this statement.

Gregory Hankin,
GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior.

38 In the United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

No. 6274

VIRGINIA REA ASSOCIATION ET. AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Notice of motion

GREGORY HANKIN, Esq.,
Department of the Interior, Washington, D. C.,
Of Counsel for the Secretary of the Interior.
ROBERT WHITEHEAD, Esq.
Lovingston, Virginia,
Of Counsel for Virginia REA Association.
WILLARD GATCHELL, Esq.,
Federal Power Commission, Washington, D. C.,
Of Counsel for Federal Power Commission.
T. JUSTIN MOORE, Esq.,
1003 Electric Building, Richmond, Va.,
Of Counsel for Virginia Electric and Power Company.
39 CHARLES F. ROUSE, Esq.,
336 Fayetteville Street, Raleigh, North Carolina,
Of Counsel for Carolina Power and Light Company.

Please take notice that the undersigned will bring on the Motion of Appalachian Electric Power Company for Leave to Intervene, which was filed on May 18, 1951, and has been previously served upon you, for hearing before the Court at the United States Court House, Asheville, N. C., on the 11th day of June, 1951, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

(S) Herbert B. Cohn,
HERBERT B. COHN,
30 Church Street, New York 8, New York,
Of Counsel for Appalachian Electric Power Company.

I hereby certify that I have this day mailed a copy of the foregoing Notice of Motion, postage prepaid, properly addressed to each of the above named persons.

(S) Herbert B. Cohn,
HERBERT B. COHN,
30 Church Street, New York 8, New York,
Of Counsel for Appalachian Electric Power Company.

MAY 22, 1951.

40 *Notice of Motion*

[Filed May 23, 1951.]
(Style of court and title omitted.)

GREGORY HANKIN, Esq.,
Department of the Interior, Washington 25, D. C.,
Counsel for Petitioner in Case No. 6273.

ROBERT WHITEHEAD, Esq.,
Lovingston, Virginia,
Counsel for Petitioner in Case No. 6274.

WILLARD GATCHELL, Esq.,
Federal Power Commission, Washington 25, D. C.,
Of Counsel for Respondent, Federal Power Commission, in both cases.

T. JUSTIN MOORE, Esq.,
1003 Electric Building, Richmond, Virginia,
Of Counsel for Respondent, Virginia Electric and Power Company, in both cases.

HERBERT B. COHN,
30 Church Street, New York 8, New York,
Of Counsel for Movant, Appalachian Electric Power Company, in both cases.

Please take notice that the undersigned will present the Motion of Carolina Power & Light Company for Leave to Intervene in these consolidated cases to the United States Court of Appeals for the Fourth Circuit upon the convening of the next term of the Court, in the Federal Building, at Asheville, North Carolina, on June 11, 1951, or as soon thereafter as counsel can be heard, said Motion, dated May 7, 1951, heretofore having been duly filed in the Clerk's office in Richmond, Virginia, and served upon each of you.

Charles F. Rouse,
CHARLES F. ROUSE,
Raleigh, North Carolina,
Of Counsel for Movant, Carolina Power & Light Company.

MAY 22, 1951.

41 *Argument on motions to intervene*

June 11, 1951 (June term, 1951), cause came on to be heard, together with No. 6274, on the motions to intervene, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Order granting motions to intervene

[Filed and entered June 11, 1951.]

United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

No. 6274

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

On petitions for review of an order of the Federal Power Commission

Upon consideration of the motions of the Carolina Power and Light Company and Appalachian Electric Power Company for leave to intervene as parties respondent in the above en-
42 titled causes, and the argument of counsel thereupon had,

It is now here ordered by this court that said motions be, and they are hereby, granted; that each of said interveners is allowed to file a brief not to exceed twenty-five (25) printed pages, covering matters not covered in the other briefs, said briefs to be filed on August 1, 1951; and that the petitioners are allowed to file a brief not exceeding fifty (50) printed pages in reply thereto, said brief to be filed on August 15, 1951.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

JUNE 11th, 1951.

June 14, 1951, the appearance of Charles F. Rouse is entered for the Carolina Power and Light Company, Intervener, Respondent.

June 16, 1951, the appearance of Herbert B. Cohn is entered for the Appalachian Electric Power Company, Intervener, Respondent.

June 18, 1951, the appearance of David W. Robinson is entered for the Carolina Power and Light Company, Intervener, Respondent.

July 10, 1951, brief and appendix of petitioner are filed.

July 31, 1951, brief Carolina Power and Light Company, Intervener, Respondent, is filed.

August 1, 1951, brief Federal Power Commission, brief Appalachian Electric Power Company, Intervener, and brief and appendix of Virginia Electric and Power Company, Respondents, are filed.

August 15, 1951, reply brief of petitioner is filed.

ARGUMENT OF CAUSE

September 5, 1951 (Special September term, 1951), cause
43 came on to be heard, together with No. 6274, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

September 18, 1951, Part III of Appendix to Petitioners' Brief is filed.

44 United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

No. 6274

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

45 *On petitions for review of order of the Federal Power Commission*

[Argued September 5, 1951. Decided October 1, 1951]

Before Parker, Soper, and Dobie, Circuit Judges.

Gregory Hankin, Counsel, Department of the Interior, (Jesse L. Ballard, Southwestern Power Administration; Curtis H. Bell, Southeastern Power Administration, and Milton C. Mapes, Jr., Bonneville Power Administration, on brief) for Petitioner in No. 6273; Robert Whitehead (Whitehead & Marshall on brief) for Petitioners in No. 6274; Bradford Ross, General Counsel, and Willard W. Gatchell, Assistant General Counsel, Federal Power Commission, (Howard E. Wahrenbrock, Assistant General Counsel; Sherman S. Poland and Harry R. Van Cleve, Jr., Attorneys, Federal Power Commission, on brief) for Federal Power Commission, Respondent; T. Justin Moore (Patrick A. Gibson and Hunton, Williams, Anderson, Gay & Moore on brief) for Virginia Electric & Power Company, Respondent; (Charles F. Rouse and David W. Robinson on brief for Carolina Power & Light Company, Intervener; and Herbert B. Cohn on brief for Appalachian Electric Power Company, Intervener.)

PARKER, *Circuit Judge:*

These are petitions by the Secretary of the Interior and a cooperative association engaged in supplying electricity
46 to its members, asking that we review and set aside an order of the Federal Power Commission granting a license to the Virginia Electric and Power Company to construct a dam at Roanoke Rapids, North Carolina, some distance down the Roanoke River from the government project at Buggs Island. Petitioners contend that the Roanoke Rapids project was removed from the licensing power of the Commission by reason of the comprehensive plan for the development of the Roanoke River basin approved by Congress in the adoption of the Flood Control Act of 1944; that the Commission is precluded from granting the license because of its approval of the comprehensive plan; and that, at all events, the Commission transcended its authority and abused its discretion in granting the license because the project as licensed was substantially different from the project as set forth in the plan approved by Congress, because it was not economically feasible and because it involved the surrender to a private corporation of valuable public power rights. All of these contentions were rejected by the Commission, and in addition the right of petitioners to raise the contentions was questioned on the ground that neither petitioner is a party aggrieved within the meaning of the statute, providing for review of the Commission's orders, 16 U. S. C. 825 L. (b).

Four questions are presented for our consideration: (1) Is either of petitioners an aggrieved party within the meaning of the statute providing for review? (2) Has Congress withdrawn the proposed development at Roanoke Rapids from the licensing power of the Commission? (3) Is the Commission precluded from granting the license here questioned by reason of its approval of the comprehensive plan for the development of the Roanoke River basin? And (4) has the Commission transcended its
47 authority or abused its discretion in granting the license? We think that all of these questions must be answered in the negative.

1. Standing of Petitioners To Sue

Review of the order of the Commission is asked under 16 U. S. C. 825 L (b), which allows review upon the petition of "any party * * * aggrieved by an order issued by the Commission." While petitioners were permitted by orders of the Commission to intervene in the proceedings before that body, this was upon condition that such permission not be construed as recognition that they might be aggrieved by any orders entered in the proceeding. The Solicitor General gave his permission that the Secretary of the Interior file a petition for review of the Commission's order; but it is clear that this could not confer any right to seek the review unless the Secretary is a party aggrieved within the meaning of the statute. The inquiry, then, is whether either the Secretary or the cooperative association can be held to be aggrieved by the order granting the power company the license to construct the dam at Roanoke Rapids.

The only grievance which the Secretary puts forward is that, if the power dam were built by the Government, he would have the right to sell the electric power produced; and the only grievance asserted by the cooperative association is that, if the Secretary should sell the power, it would have a preference in the right to purchase same. The language of the statute relating to the matter is as follows (58 Stat. 890):

"Sec. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior,
48 who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to

the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. * * *"

It is perfectly clear that this statute confers no right or interest in any power project or its development, or any responsibility with regard thereto, upon the Secretary of the Interior, or upon the cooperatives mentioned; but merely provides how the surplus power developed at government projects shall be disposed of. Whether a project shall be developed by the government or under license by private enterprise is a matter which Congress has committed, not to the Secretary or to cooperatives who may desire to purchase power from him, but to the discretion of the Commission. Section 7 (b) of the Federal Power Act provides:

"(B) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

49

That the United States, representing the people of the country, may have an interest in the construction of a power project does not confer upon the Secretary of the Interior any authority to go into court for its protection. The safeguarding of that interest has been confided to the Power Commission; and before a member of the cabinet may attack the Commission's action before the courts he must be able to point to some special interest for which he is charged with responsibility that may be adversely affected by the action attacked. The only responsibility of the Secretary relates to the disposal of surplus power from government projects; and no duty or responsibility with regard thereto can possibly arise until the government has authorized the project and entered upon its construction.* Until then he has no more duty or responsibility in this connection than has the Postmaster General. A fortiori the cooperative association, whose only possible interest is to purchase power which the Secretary may sell, has no such right, duty or responsibility with respect to the construction of a power project as would give it standing in court

*The Secretary of the Interior has, in fact, no responsibility whatever with respect to the disposal of power produced by any project until the Secretary of the Army has certified that in his opinion it is not needed in the operation of the project.

to question an order of the Commission. No case has been cited which supports the right of either the Secretary or the association to ask review of the Commission's order, and we know of none. For cases holding generally that some right or interest of a complaining party must be invaded to justify him in asking
50 relief in court, see Alabama Power Co. v. Ickes, 302 U. S. 464; Federal Communications Commission v. National Broadcasting Co., 319 U. S. 239; U. S. Cane Sugar Refiners v. McNutt, 2 Cir. 138 F. 2d 116.

There is nothing in United States v. Interstate Commerce Commission, 447 U. S. 426, which supports the position of petitioners. That case holds merely that suit by the United States to protect its interests is not precluded merely because the suit must be brought against a governmental agency. Nothing is said to indicate that an officer of the government may go into court against such agency to protect the public's interest with respect to a matter as to which he is charged with no duty or responsibility.

For the reasons stated, we are of opinion that petitioners are not parties aggrieved within the meaning of the statute and consequently have no standing in court to ask that the order of the Commission be reviewed or set aside. Assuming, however, that they have such standing, we do not think that they have made a case entitling them to relief, since we are of opinion, for reasons which we shall now examine, that the granting of the license here in question was within the Commission's power and that there is no basis for holding that the discretion vested in it by law was not properly exercised.

2. The Power To Grant the License

No question is or can be raised as to the general power of the Commission to grant licenses, with proper conditions and limitations, to private corporations to construct power dams in the navigable streams of the country, as provided by the Federal Power Act and its amendments. 16 USC 791 et seq. That act, which was passed for the purpose of developing and preserving to the people the licensing of water power projects to private enterprise for a limited period, upon terms which will safeguard the
51 interests of the public, and with the right on the part of the United States to take over the project upon terms that are just upon the expiration of the license. Recognizing that there are some projects which should be developed by the United States, and not by private enterprise, Congress has provided in section 7 (b) of the act, heretofore quoted, that whenever in the judgment of the Commission the development of any project should be undertaken by the United States itself, the Commis-

sion shall not approve "any implication for any project affecting such development", but shall submit to Congress its findings and recommendations with regard thereto.

The principal contention of the petitioners is that Congress took over the Roanoke Rapids project for construction by the United States in the Flood Control Act of 1944 and thereby removed it from the licensing power of the Commission. We agree with petitioners that where Congress takes over a project and authorizes its construction by the United States, the effect is to preclude the Commission's granting a license for its construction by a private corporation. Cf. Savannah River Electric Co. v. Federal Power Commission, 4 Cir. 164 F. 2d 408. We do not think, however, that the Flood Control Act of 1944 can reasonably be construed as taking over the United States the construction of the Roanoke Rapids project.

In 1944, the Chief of Engineers submitted reports to Congress recommending comprehensive plans for flood control in river basins throughout the United States. One of these reports, H. D. 650, related to the Roanoke River Basin and recommended, as economically justified, a comprehensive plan of improvement for the Roanoke River Basin, consisting of 11 developments for hydroelectric power, flood control, navigation, and other uses, the cost of each being separately estimated and the
52 total estimated cost being $124,000,000. The report found that the comprehensive plan provided for the optimum development of the water resources of the basin, and that, to safeguard the interests of navigation and flood control, the dams and power facilities should be constructed, operated and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers. The 11 developments listed in the order of their priority were Buggs Island, Gaston, Roanoke Rapids, Smith Mountain, Leesville, Taber, Melrose, Randolph (on the main stream or minor tributaries) and Philpott, Stuart, and Schoolfield (on the larger tributary streams). Of these, only three, Buggs Island, Philpott and Smith Mountain, were flood control projects, the other eight being straight power projects.

We think it clear that, while giving its approval to the comprehensive plan for the development of the Roanoke River Basin, Congress did not adopt it in its entirety for governmental construction, but, on the contrary, authorized construction of only the two principal flood control projects, Buggs Island and Philpott. The language of the statute having reference to the Roanoke River Basin is as follows, 58 Stat. 894:

"Roanoke River Basin. *The general plan* for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House

Document Numbered 650, Seventy-eighth Congress, second session, *is approved* and the *construction* of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby *authorized* substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000." [Italics supplied.]

53 Petitioners contend that the entire plan was adopted and authorized by reason of the general provision appearing in the opening paragraph of section 10 of the act, 58 Stat. 891,* which was followed by 15 pages listing plans for flood control and river basin development on practically every important stream in the country as recommended in various reports of the Chief of Engineers. It could not reasonably have been intended, we think, that all of the projects embraced in these comprehensive plans were authorized for government construction without further action by Congress and were withdrawn from private development under license from the Commission; and the fact that the act expressly authorized certain of the projects is clear indication that others embraced within the plans were not authorized. Expressio unis est exclusio alterius. So far as projects in the Roanoke River Basin are concerned, their coverage by a specific paragraph withdraws them from the general provision under the well-settled rule that general language of a statute will not be held to apply to a matter specifically dealt with. Ginsberg & Son v. Popkin 285, U. S. 204, 208; MacEvoy Co. v. United States, 322 U. S. 102, 107. As said in the case last cited:

"However inclusive may be the general language of a
54 statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'"

When Congress intended to authorize the construction of an entire comprehensive plan of river development, it did so in no uncertain terms. In this very statute it authorized the construction of the entire plan proposed for the Upper Mississippi River Basin in language which contrasts strongly with the language here under consideration. The language there used was as follows (58 Stat. at 896):

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*The language relied on is as follows: "Sec. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the postwar construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein. * * *"

"In addition to previous authorization, there is hereby authorized to be appropriated the sum of $10,000,000 for the prosecution of the comprehensive plan approved in the Act of June 28, 1938, for the Upper Mississippi River Basin, including the project for the Red Rock Dam on the Des Moines River for flood control and other purposes, substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, at an estimated cost of $15,000,000."

Had Congress intended to withdraw all the projects of an approved general plan from the licensing power of the Commission, there was no reason why this would not have been done plainly and explicitly. In the 1928 Boulder Canyon Project Act (45 Stat. 1057, 1062) it was provided that the Commission should not issue licenses affecting the Colorado River. A similar ban was placed on the granting of licenses to construct projects in the Potomac River Basin. (45 Stat. 1012). It is only reasonable to conclude that if Congress, having established a Federal Power Commission as a special administrative body to handle power projects, desired to strip the Commission of a great part of
55 its control over the important rivers of the nation, it would have said so expressly and not by indirection.

It should be remembered, in this connection, that legislation relating to flood control or rivers and harbors, is no haphazard matter, but is handled by Congress through experienced committees with long continuity of services having in charge long-range programs of development. They are in constant touch with the governmental agencies charged with carrying out the programs and in interpreting legislation with regard thereto great weight must be accorded, not only to Congressional action which involves interpretation of prior legislation, but also to opinions expressed by members of the committees having the legislation in charge and members of the governmental agencies who carry out the programs. When these are looked to, there can be no doubt that the proper interpretation of the act is as we have indicated.

When the act was on passage, Mr. Whittington, Chairman of the House Committee on Flood Control, stated that all of the dams authorized were primarily for flood control and none was primarily for the generation and distribution of power. 90 Cong. Record 4122, 4199, 4202. Senator Overton made the same statement in the Senate. 90 Cong. Record 8625. This would seem to negative any suggestion that it was intended to authorize straight power projects, like Roanoke Rapids, merely because they were embraced in the general plans that were given approval. As to the Roanoke River plan, the Senate Committee Report* states:

*Senate Rept. 1030, 78th Cong., 2d Sess., June 22, 1944, on H. R. 4485.

"The Committee recommends approval of the comprehensive plan and *authorization for construction* of the *Buggs Island* and *Philpott* reservoirs in accordance with the recommendation of the Chief of Engineers." [Italics supplied.]

56 Since the passage of the act, Congress has twice taken action which is inconsistent with the idea that projects not specifically authorized were adopted for construction because embraced in the general plans approved—once in considering but refusing to authorize the construction of the Smith Mountain project on the Roanoke River embraced in the comprehensive plan here under consideration, and again in authorizing the construction of the Hartwell project on the Savannah River. The projects on the Savannah River were dealt with in the Flood Control Act of 1944 in exactly the same way as those on the Roanoke, i. e., a general plan involving eleven projects was given general approval but only the Clark Hill Project was authorized for construction. Later, when it was desired to proceed with one of the others, the Hartwell project, it was deemed necessary to obtain authorization for it, although it was one of the projects in the comprehensive plan which had been approved. When the omnibus bill H. R. 5472 was reported out by the House Committee, it contained the following sentence: "There is hereby authorized to be appropriated the sum of $40,000,000 for the construction of projects in the general plan for the comprehensive development of the Savannah River Basin * * *." A committee amendment was offered to this, restricting the authorization to the Hartwell project, which was explained by Chairman Whittington as "a clarifying amendment to make certain and definite that this authorization just refers to that project and no other."* If the general plans had been authorized for construction by the Flood Control Act of 1944, there would, of course, have been no reason for this legislation authorizing the Hartwell project,

57 and no sense in rejecting the authorization of the Smith Mountain project. The Secretary attempts to explain the latter action on the ground that such authorization would have moved Smith Mountain ahead of Roanoke Rapids and Gaston in the plan of development, but no such reason appears to have entered into the consideration of Congress, which was told that Roanoke Rapids and Gaston were being developed by private enterprise and that Smith Mountain should be developed as a flood control project.

The Power Commission's interpretation that the Flood Control Act did not authorize the construction of the Roanoke Rapids project by the United States we have before us in this case; and

*95 Cong. Rec. 11075.

the record leaves no doubt that the Board of Engineers places the same interpretation on the act. In testifying before the Committee of Congress with respect to the Hartwell project on the Savannah River, Lt. Col. Gee, representing the Board of Engineers, said:

"Col. GEE. The project is a part of the approved plan, sir.

"The CHAIRMAN. What do you mean by that to say, let us understand what you mean. Is not the word 'approved' an authorization for the plan but without appropriation, or without an authorization for the appropriation? What is the difference between approving and authorizing a plan?

"Col. GEE. We have never construed the approval of the plan to carry with it the authorization to construct the elements of that plan.

"The CHAIRMAN. Nor do we. * * *"

And with respect to the Smith Mountain Project in the Roanoke River plan, Col. Gee said:

"Mr. PICKETT. I understand in the over-all comprehen-
58 sive plan that you have proposed 11 reservoir structures, only three of which have any part of their purpose to be flood control.

"Col. GEE. That is correct, sir.

"Mr. PICKETT. And those three are Philpott, Buggs Island, and Smith Mountain.

"Col. GEE. Yes, sir.

"Mr. PICKETT. Smith Mountain is the one presently under consideration, and you have under authorization and construction both Philpott and Buggs Island.

"Col. GEE. That is correct, sir.

* * * * *

"Col. GEE. We would be remiss in our duty as engineers serving the Congress if we did not point out to you the potentialities of the Roanoke River Basin. We have said in the report that the building of three of these 11 projects will produce all of that flood control which we believe to be economically justified, that the remaining 8 are straight power projects, and if it is desired that power projects be built by the federal government, we believe these are the sites best adapted to that purpose, and this is approximately what it will cost to develop the full capabilities of that river basin.

* * * * *

"Mr. ANGELL. Is the federal government at the present time planning to develop any of those dams on the lower part of the river which are devoted exclusively to power production?

"Col. GEE. No, sir. They have the same status in this basin plan as the eight remaining projects. They are part of the ap-

proved plan. Their being in that plan certainly is no bar to a private utility company coming in and seeking to develop one of these projects.

"Mr. ANGELL. And that is what is being done now.

59 "Col. GEE. That is being done now at Roanoke Rapids, sir."

Congress was thus thoroughly advised of the position that was being taken by responsible governmental agencies as to the meaning of the act. The fact that it has not taken action to withdraw projects within the plans approved from the licensing power of the Commission is an indication that it concurs in that position.

The question arises as to what is the effect of Congressional approval of a plan, if not to authorize and adopt it for construction by the United States. The answer, we think, is found in the Flood Control Act of 1936, 49 Stat. 1570, 1592, sec. 6, providing that when formal reports are made to Congress as therein authorized, no additional report or estimate shall be made unless authorized by law or by resolution of the Committee on Flood Control of the House or the Committee on Commerce of the Senate. A report submitting a plan of river development, if approved by Congress, lays down in general terms the policy of development to be followed. It does not authorize projects embraced in the plan of the development or commit Congress to constructing them.

The Secretary argues with respect to the Flood Control Act of 1936 that, because it contains a proviso that the government shall not be deemed to have entered upon any project for which it authorized preliminary surveys until the project shall have been "adopted" by law,* the general language of the 1944 act, heretofore quoted, which used the words "adopted and authorized" with respect to the plans, must be deemed to have entered upon

60 the plan of Roanoke River development, since the Roanoke River was one of the rivers for which a preliminary survey was provided by the 1936 act. It is a sufficient answer to this that the limitation inserted in the 1936 act was intended to preclude contentions that it had authorized projects for which it had authorized only preliminary surveys, not to enlarge the number of projects authorized by subsequent acts.

When we look to the history of flood control legislation, the reason and purpose of the act before us, and the effects and consequences of the interpretation placed upon it by the Secretary, we

*The language relied on is found at 49 Stat. 1592 and is as follows: "And provided further, that the government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this act until the project for the proposed work shall have been adopted by law."

think that there can be no question but that our interpretation is correct. The Federal Water Power Act of 1920, 41 Stat. 1063, 16 USC 791 et seq., was enacted after long discussion of how the water power of our rivers could best be developed and utilized with due consideration for the interests of navigation and flood control. The Senate Report (Senate Report 180, 66th Cong. 1st Sess.) recommending the passage of the act, says:

"It is unnecessary to point out the need for or the beneficent results to come from water power development. It means a saving of coal, and a lower price for that used; a saving of oil, and a lower price for that consumed; more efficient transportation, and lower cost of service; the development of new industries; the building up of new communities; the creation of new property values, subject to taxation for the support and maintenance of local and state governments; and added employment for labor and increased markets for agricultural products. Every year that our water powers are undeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development. Legislative action should be delayed no longer.

We should do one of two things: We should pass legisla-
61 tion which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the government itself should proceed to make this development. This bill proceeds on the theory of private development with ultimate public ownership possible."

The President's Water Resources Policy Commission says of the Act (vol. 3, p. 272):

"Congress until 1920 generally gave direct legislative authorization on a project-by-project basis for nonfederal development of power on streams under its jurisdiction. Restrictive conditions in grants were few and inconsistent. And many of the grants were perpetual in their terms. With rare exception, they included no provision for imposition of a charge for the privilege itself, or for disposition of properties. But with the uncertainty of a grantee's tenure and investment under grants subject to termination, private development had moved slowly.

"Seeking to remedy this situation, Congress in 1920 passed the Federal Water Power Act, regularizing and facilitating federal permission for nonfederal development through a licensing system. The Act's history reflects a legislative purpose to encourage nonfederal development while safeguarding the public interest and making possible ultimate public ownership. And as we shall see, the Act itself reserves a right to ultimate public ownership of licensed projects and also holds the door open to direct federal

development by prohibiting the issuance of licenses whenever the Federal Power Commission determines that development should be undertaken by the United States."

There is nothing in subsequent legislation to indicate
62 any intention to depart from the policy embodied in the Federal Water Power Act. The various flood control acts were directed to the construction of dams where flood control was the principal object and the production of hydroelectric power was incidental. For constructing these, over-all plans of river basin development were necessary in the interest of navigation as well as of flood control; and it is not reasonable to assume that, in approving such plans and undertaking the flood control projects which they envisaged, Congress intended to withdraw from development by private enterprise the straight power projects lying in the river basins. It was foreseen, of course, that the building of the flood control projects would benefit power projects lower down the stream, but provision had been made, in section 10 (f) of the Federal Power Act, for the Power Commission to assess the value of such benefits against the licensees of the power projects. There would have been no sense in permitting water power to go to waste, when private enterprise was willing to develop it, merely because the government was constructing a flood control reservoir in the river basin and as incidental thereto had approved a general plan of river basin development.

3. The Commission's 1944 Approval of the Plan

On May 3, 1944, the Commission wrote a letter to the Chief of Engineers of the War Department giving its approval, with certain modifications, to the general plan for the development of the Roanoke River Basin recommended by the Engineers. The pertinent portion of that letter is as follows:

"Based upon the consideration given hereinbefore, and upon careful review of the reports of your Department, the Com-
63 mission concurs in the conclusion of the Board of Engineers for Rivers and Harbors that the comprehensive development of the Roanoke River Basin, in general accordance with the plans prepared therefor by the district engineer consisting of 11 dam and reservoir projects with power, is desirable and that the Buggs Island and Philpott projects would constitute a desirable initial step in the development of the Roanoke River Basin. The Commission believes that the power which could be produced at the Buggs Island and Philpott projects could be absorbed and profitably utilized in the postwar period within a reasonably short time following their construction and that plans, therefore, for these two projects should be prepared with the view to their construction in the early postwar period."

The Commission's approval of plans of this sort goes back to the act of March 3, 1925, 43 Stat. 1186, 1190, which directed the Secretary of War and the Power Commission jointly to prepare and submit a list of streams on which comprehensive surveys should be undertaken and a list of the purposes for which improvements should be proposed. The Flood Control Acts of 1938, 52 Stat. 1215, and of 1941, 55 Stat. 638, provided that penstocks or other similar facilities adapted to possible future use should be installed in any dam therein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and the Power Commission. And the Commission states in its brief that it has worked very closely with the Army Engineers in connection with comprehensive river basin plans, known as 308 reports, since the preparation and submission of such reports was first required by Congress, and that, while there is no statutory requirement that the Chief of Engineers submit to Congress the views of the Commission, he has consistenly followed the custom of doing so.

64 Petitioners contend that the letter to the Chief of Engineers by the Power Commission amounted to a recommendation to Congress, pursuant to section 7 (b) of the Federal Power Act, heretofore quoted, that all the projects in the plan submitted to Congress should be constructed by the United States. It is manifest, however, that this letter was merely an approval of the plan of the Engineers in accordance with the practice to which we have referred, and not a 7 (b) recommendation to Congress. Even if it were construed to be the latter it would not preclude action by the Commission, since it was made in 1944 and Congress has taken no action in the meantime, except with respect to the Buggs Island and Philpott projects. In the case of application for a license for private development of power at a government dam, it is provided under section 4 (e) of the Federal Power Act that a recommendation by the Commission in favor of government development prevents the issuance of a private license only for a period of two years after such recommendation. In the light of this statute, it would certainly be unreasonable to hold that where the government has no dam and has made no decision to build one, the Commission is prevented by such recommendation for a longer period from granting a private license. The natural resources of the country should not be withheld from needed development because of a recommendation of the Commission on which Congress has failed to act.

There is nothing to the contrary in our decision in Savannah River Co. v. Federal Power Commission, 4 Cir. 164 F. 2d 408. That case involved the Clark Hill Project, the construction of

which had been expressly authorized by Congress and upon which work had already been commenced. We said that it could hardly have been intended by Congress that the Commission should
65 have jurisdiction to grant licenses or to make reports to Congress "in the case of projects which Congress had expressly taken over for the United States and upon which work was going forward under appropriations made by Congress." We said further: "The Commission had recommended * * * that the United States construct the project; and Congress had accepted its recommendation and had acted upon it. Public money had been spent upon the project and the work was going forward."

Petitioners make an additional contention to the effect that the private construction of the Roanoke Rapids project would adversely affect the comprehensive plan approved by the Commission and by Congress by damaging its feasibility and power benefits and that, since Congress has approved the plan, the Commission is without power to grant a private license. The contention is that the "cost to benefit" ratio of 1.47 of all 11 projects is reduced to 1.34 if the Roanoke Rapids project, with a ratio of 2.60, is removed from them. This argument, however, goes, not to the power of the Commission, but to the wisdom of its exercise of power; since it is for the Commission to say, where Congress has not already authorized the construction of a project, whether it should be licensed for private development or recommended to Congress for governmental construction. We point out hereafter that there was no abuse of discretion in this regard.

4. The Commission's Exercise of Authority

Assuming that the Commission had power to license a power project within the plans for the Roanoke River development, petitioners contend that the Commission transcended its authority or abused its discretion here: (a) because the project licensed did not conform to the general plan as approved in Flood Con-
66 trol Act of 1944; (b) because the Roanoke Rapids project was not economically feasible for private development; and (c) because the granting of the license involved the surrender to private interests of valuable public power rights. We think that there is no merit whatever in any of these contentions.

(a) With respect to the difference between the project as licensed and as outlined in H. D. 650 approved in the Flood Control Act, it appears that the dam as licensed is located a little farther downstream and has an elevation of 132 instead of 127 feet and that the project has an 8,000 foot tailrace instead of an 8 mile canal. This

canal would make an island out of the towns of Roanoke Rapids and Weldon, would be very costly in view of urban development since 1944 and would be a deterrent to further community development. These changes received the approval of the Commission and the Army engineers, they increased the capacity of the project from 58,800 to 91,000 kw. and the evidence shows that from every standpoint they were wise and salutary. They were insisted upon by the staff of the Commission and increased the cost of the project to the licensee by several millions of dollars. They are not of significance with respect to the federal purposes of the river basin development, they do not interfere with the complete fulfillment of the objectives of the plan and they are necessary to a more complete utilization of the water resources that are being developed. They are in accordance with the overall purpose of the plan and not a departure from it and furnish no basis for holding that the Commission has transcended its authority or abused its discretion in the premises. The general approval given the original plan did not make its details a matter of statute or freeze the development of the project so as to preclude minor changes which would add to its feasibility and efficiency.

67 (b) The Commission found that the construction of the Roanoke Rapids project by the Power Company, which would use it for peaking purposes in connection with steam generating equipment, was economically feasible and was the construction best adapted to the proper development of the project for power purposes; and we think that this finding is amply supported by the testimony. There was testimony of expert engineers that with the natural flow of the stream the project would be economically feasible as a peaking plant for the Power Company, that the operation of the Buggs Island project would greatly increase its production of electric energy and that after payment of headwater benefit charges of $261,000 per year, which might reasonably be assessed in favor of the Buggs Island Project, the cost of producing current would be less than the cost of generating it by the use of steam. Petitioners attack this testimony with arguments based on isolated portions of the testimony of some of the experts; but it was for the Commission, not the courts, to say what parts of the testimony of the witnesses it would accept and what conclusions it would draw from them. And the rule is well settled that we must affirm its findings if supported by substantial evidence.

The rule is no different because the questions involve matters of scientific knowledge and the evidence consists largely of the opinion of experts. The court may not, for that reason, ignore the conclusions of the experts and the Commission and put itself in the absurd position of substituting its judgment for theirs on contro-

verted matters of hydraulic engineering. It is in just such matters that the findings of the Commission, because of its experience and the assistance of its technical staff, should be accorded the greatest weight and the courts should be most hesitant to substitute their judgment for that of the Commission.

68 We deal with a similar question in Traveler's Indemnity Co. v. Parkersburg Iron & Steel Co., 4 Cir. 70 F. 2d 63, where the contention was made that questions of fact dependent upon scientific knowledge should be decided by the court and a verdict directed accordingly. What we said there with reference to such questions being for the decision of the jury applies with even greater force here, where the question is one of substituting our judgment for that of the Commission, a body constituted by law and qualified by experience for dealing with the technical scientific matters involved. We said in that case:

"The rule is well settled, of course, that evidence contrary to established physical facts has no probative value. U. S. v. Diehl, 4 Cir. 62 F. 2d 343; Atlantic Coast Line R. Co. v. McLeod, 4 Cir. 11 F. 2d 22. But to justify the ignoring of evidence under this rule the evidence ignored must be utterly at variance with well-established and universally recognized physical laws and therefore inherently impossible. See Wasiota & B. M. R. Co. v. Hall, 167 Ky. 8; 9, 181 S. W. 629; Wolf v. City R. Co., 50 Or. 64, 85 P. 620, 91 P. 460, 15 Ann. Cas. 1181. The rule means merely that courts are not required to stultify themselves by giving serious consideration to what every man knows to be untrue. It does not mean that they must determine for themselves, from the testimony of experts or otherwise, the truths of science which may be involved in cases before them, and ignore testimony that does not coincide with their conclusions. Questions of fact are questions for the jury; and they do not become questions for the court merely because their solution may require scientific knowledge or expert opinion."

(c) It is argued that the granting of the license to a private company involves the surrender of valuable power
69 rights belonging to the public, because it is said that the government could obtain the capital necessary for development at a low interest rate and could supply current at a low cost to the users of electricity. The question as to whether a power project should be licensed for construction by private enterprise or constructed by the government itself is one which, as we have seen, Congress in section 7 (b) of the Federal Power Act has entrusted to the judgment of the Commission; and the Commission has given consideration to the question and has decided it adversely to the contention of the petitioners. Its findings with respect to the matter are as follows:

"(57) The record in this proceeding does not provide a proper or sufficient basis for judgment or a finding under section 7 (b) of the act that development of the water resources at Roanoke Rapids should be undertaken by the United States itself or for the submission of such findings and a recommendation to Congress to such effect, as provided in such section.

"(58) The evidence received does not show that the Roanoke Rapids site would be developed at any time by the Federal government, should the pending application for license be denied. Such denial would of course permit the water, which the applicant plans at once to utilize, to continue to be wasted to the sea."

The Chief Examiner of the Commission, in his report, which was approved by the Commission, said:

"All arguments for recommendation for federal development would seem to be premised upon an assumption for which no basis can be found in the record—that the United States will in fact build Roanoke Rapids within some reasonable, foreseeable
70 time, if no federal license is issued to a private or non-federal applicant. The contrary appears to be the fact. The probability is that so far as the United States is concerned, the water resources at Roanoke Rapids are destined to be undeveloped and unutilized for a long time to come. It is not believed that such wastage or nonutilization of water resources can be in the public interest, particularly when there is a need for the energy in the area and a private developer with private capital stands ready, willing, and able to utilize them, with the protection of the public interest furnished by the terms and conditions of a federal license."

Little need be added to what was said by the Commission and the Chief Examiner. The fact that the cost to benefit ratio for Roanoke Rapids is higher than that of the other projects in the general plan does not mean that private enterprise is being allowed to profit at the expense of the public. Roanoke Rapids is a straight power project and its high ratio is based upon its estimated power production, increased as it will be, by the headwater benefits from Buggs Island. If Roanoke Rapids is licensed for private development, however, these headwater benefits will be taxed in favor of the government as owner of Buggs Island and against the Roanoke Rapids project, so that the public will be compensated for any benefit that results to Roanoke Rapids from the Buggs Island construction. Surely it is in the public interest that this be done rather than that the potentialities of Roanoke Rapids remain undeveloped and the government lose in compensation for the headwater benefits which would acrrue from its development.

The proposed development will involve the investment of some $27,000,000 by the Power Company. It will have a total installed capacity of 91,000 kilowatts. The annual value of
71 its capacity and energy will be around $400,000 over and above annual costs. All of this is being lost so long as the project is not constructed; and its construction, even though by private enterprise, adds just that much to the wealth of the country and the available electrical energy, so greatly needed in this period of national emergency. To permit its construction as provided by the license, will surrender no public assets to anyone but will merely permit the Power Company to develop the property which it has already acquired for power purposes and thus utilize a source of power now being wasted. The property will be operated in the public interest and the charges for power will be fixed by the Commission, as provided in the power act. The United States will be paid for headwater benefits from Buggs Island around a quarter of a million dollars a year and will have the right to acquire the project at the end of the term of the license in accordance with the terms of that act. In this situation, it cannot reasonably be said that the Commission has abused its discretion and is surrendering valuable rights of the public because it does not refuse a license for construction by private enterprise of this project which Congress has shown no intention of constructing.

For the reasons stated, the petitions asking that the order of the Commission be set aside will be denied.

Petitions denied.

72 DECREE

[Filed and Entered October 1, 1951.]

United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on the petition to review and set aside the order of the Federal Power Commission, and on

the transcript of the record from the said Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the petition to set aside the order of the Federal Power Commission in this cause, be, and the same is hereby, denied.

October 1st, 1951.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

73 Nos. 6273 and 6274

In the United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Petition for Rehearing

GREGORY HANKIN,

Counsel for Petitioner, the United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior.

[Filed, Oct. 30, 1951.] CLAUDE M. DEAN, *Clerk.*

74 IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. NOS. 6273 AND 6274. UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER *v.* FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS. VIRGINIA REA ASSOCIATION ET AL., PETITIONERS *v.* FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS. PETITION FOR REHEARING

Come now the Petitioners in the above consolidated cause and, pursuant to Rule 19 of the Rules of this Court, petition this Hon-

orable Court for a rehearing. As reasons therefor they assign the following:

I. Whether the Petitioners are "Aggrieved" Parties

In the opinion rendered, the Court stated (p. 4[1]):

"The only grievance which the Secretary puts forward is that, if the power dam were built by the Government, he would have the right to sell the electric power produced; and the only
75 grievance asserted by the cooperative association is that, if the Secretary should sell the power, it would have a preference in the right to purchase the same."

This correctly states some of the consequences which would flow, if the Commission had not granted a license to Virginia Electric and Power Company to construct a project at Roanoke Rapids. It is not a correct statement of the interests which the Secretary and the Virginia REA Association have and the manner in which those interests would be "adversely affected" by the issuance of the order.

A. The Secretary is an "Aggrieved Party"

1. The interest of the Secretary of the Interior is that of a competitor of VEPCO in the sale of power in the Roanoke River area in Virginia and North Carolina. This is so, because he is charged, by Section 5 of the Flood Control Act of 1944, 58 Stat. 887, 890, with the responsibility of disposing and transmitting power generated at reservoir projects under the control of the Department of the Army. Among the projects now under construction is the Buggs Island unit of the congressionally approved comprehensive plan for the development of the Roanoke River Basin. The record is replete with testimony showing that there is competition between the Secretary of the Interior and VEPCO, and in our main brief (pp. 94–96) we have referred to facts of public record illustrating that the completion for the sale of Buggs Island power is very keen, although this unit has not yet been completed.

The competitor-interest of the Secretary is adversely affected, because by granting a license to VEPCO, the Roanoke Rapids project is withdrawn from Federal development, thus rendering Buggs Island power less valuable and rendering the power more costly, as is shown by uncontradicted evidence.

2. Had the Secretary's interest been no greater than that of a private competitor, he would have been a party "aggrieved" by the Commission's order, in the sense that his interest would have

[1] Pages in the pamphlet opinion.

been "adversely affected," according to the decisions of the Supreme Court in Federal Communications Commission *v.*
76 Sanders Brothers Radio Station, 309 U. S. 470, 476–7 and Scripps-Howard Radio, Inc. *v.* Federal Communications Commission, 316 U. S. 4, 14–5. See also National Coal Association et al. *v.* Federal Power Commission (No. 10376, D. C. Cir.) decided June 18, 1951, where members of a different but competitive industry were held to be aggrieved parties.

3. The Secretary's interest is greater than that of a private competitor, because, in addition to his interest as a competitor, he is vested with statutory powers and duties of great importance.

The Secretary is required to dispose of the power in such a manner as to encourage most widespread use at the lowest possible rates to consumers consistent with sound business principles, giving preference in the sale of power to public bodies and cooperatives. The rate schedules must be calculated with due regard to the recovery of the cost of generation and transmission, including amortization of the Federal investment fairly allocable to power over a reasonable number of years. It follows that if Roanoke Rapids were not withdrawn from the comprehensive plan as a Federal undertaking, and were constructed by the United States, the Secretary would be in a better position more effectively to carry out these directives of Congress. The uncontradicted evidence shows that the cost of power from Buggs Island alone would be 5.1 mills per kwh, while the cost of power from Buggs Island and Roanoke Rapids, operated as a single project, would be 4.16 mills per kwh.

4. In the disposition of power the Secretary represents, and stands in the position of, the United States. He is in the position of a parens patriae to protect the interests of the consumers of power, and therefore has standing in Court. See Cia Mexicana De Gas, et al. v. Federal Power Commission (5th C.), 167 F. (2d) 804, 805–6, where the State of Texas was held to be a party "aggrieved" by an order of the Commission.

5. The Court held (p. 6) that, until the United States enters upon the actual construction of a project, the Secretary of the Interior has no more duty or responsibility in this connection than the Postmaster General. We respectfully submit that such a conclusion is erroneous. The interest of the Post-
77 master General in the area is at most that of a retail consumer of power. Had he been a party to the proceeding, he would not have been an aggrieved party, because his consumer interest would not be substantial. On the other hand, the interest of the Secretary, as a competitor, is so substantial that, in order to avoid competition, VEPCO has gone to great lengths to persuade Congress not to appropriate funds for the construction of

transmission lines. In order to meet his competition, VEPCO has lowered the rates charged by them to the cooperatives in Virginia by 25%, and has entered into a contract more advantageous to NACA than the one offered before it became evident that the power from Buggs Island might be transmitted to Langley Field.

6. The Court also held (p. 6) that the Secretary of the Interior had no responsibility whatever with respect to the disposal of power produced at any project until the Secretary of the Army "certified that in his opinion it (the power) is not needed in the operation of the project." We respectfully submit that this is a construction of Section 5 which is wholly unrealistic, is based on an assumption of fact which is not in the record, and is wholly without factual foundation.

There is no such a thing as a "certificate" by the Secretary of the Army that in his opinion the power from a project is not needed in the operation of the project. When the first electric unit of a project is installed, the power becomes simultaneously available for transmission in accordance with contracts entered into long before the unit is installed. That part of the energy which is needed for the operation of the project itself is used on a day-to-day basis in the operation of the project *without charge*. This is the meaning and effect of the phrase "in the opinion of the Secretary of War not required for the operation of such projects", in Section 5 of the Flood Control Act of 1944. Furthermore, the amount of power, used in the operation of the projects, is insignificant, averaging 0.38% of the energy produced. If the amount of energy required in the operation of a project were a substantial part of the total production, such project would most probably be infeasible and would not even be recommended for construction.

78 B. THE COOPERATIVES ARE "AGGRIEVED" PARTIES

7. The interest of the Virginia REA Association and its members is twofold. These petitioners are both competitors of VEPCO in the sale and distribution of power in their respective areas in Virginia; they are also purchasers of power in wholesale quantities. As competitors they are aggrieved parties within the meaning of the Sanders and Scripps-Howard cases referred to above. As consumers, they are aggrieved parties within the meaning of Associated Industries v. Ickes, 134 F. (2d) 694; 697, 699–700.

In addition to being "aggrieved" as competitors and substantial consumers, these petitioners are also aggrieved because they have a statutory right to a preference in the purchase of power from Buggs Island. The Commission's order, removing Roanoke

Rapids from Government development, adversely affects their interest, because with Roanoke Rapids as part of the Congressionally approved plan, they could purchase Buggs Island power at a more advantageous price.

C. THE COURT ERRED IN HOLDING THAT PETITIONERS HAVE NO STANDING

8. The Court, after quoting Section 7 (b) of the Federal Power Act, stated:

"That the United States, representing the people of the country, may have an interest in the construction of a power project does not confer upon the Secretary of the Interior any authority to go into court for its protection. The safeguarding of that interest has been confided to the Power Commission; and before a member of the cabinet may attack the Commission's action before the courts he must be able to point to some special interest for which he is charged with responsibility that may be adversely affected by the action attacked" (p. 6).

One of the substantive questions raised by the petitions for review is whether, in view of Section 10 of the Flood Control Act of 1944, it was within the discretion of the Commission to
79 determine whether Roanoke Rapids should be developed by the United States or by a private company under a license. To say that the petitioners are not aggrieved, because the determination of this question lies with the Commission, would beg the question. In the determination of the question whether a petitioner has standing in court, it must be assumed that the order in question is invalid for the precise reasons assigned by the petitioner. Associated Industries v. Ickes, supra, at p. 699.

If the Court's were a valid approach to a determination of the question whether a petitioner is a party aggrieved by an order granting or denying a license, then it would follow that no party may seek a review of any order granting or denying a license, because in each case it may be said that Congress committed to the Commission's discretion the question whether water resources should be developed by the United States or whether a license should be granted for the construction of a hydroelectric project.

9. If, by the statement quoted above, the Court meant that such an approach would obtain only in cases where a cabinet officer asserts that the public interest requires the development of the water resources by the United States, or that the project has already been reserved for development by the United States, then the decision does present a departure from and is in conflict with the case of United States v. Interstate Commerce Commission, 337 U. S. 426. The Court's approach must then be based on the proposition that the conflicting interests in the present case are

those of the Secretary of the Interior and the Federal Power Commission, whereas the conflicting interests here are really those of the Secretary of the Interior and the Virginia Electric and Power Company.

In the case of United States v. Interstate Commerce Commission, the District Court came to an erroneous conclusion, because it thought that the conflicting interests there were between the United States and the Interstate Commerce Commission, an agency of the United States. If that were so, then the District Court might have been right in holding that there was no case or controversy. The Supreme Court reversed that decision,
80 because the controversy was between the United States and certain railroads, with the Interstate Commerce Commission acting as an impartial tribunal to determine the rights of the parties.

10. The Court stated (p. 6) that no case has been cited which supports the right of either the Secretary or of the Virginia REA Association to seek review of the Commission's order. While, in the course of the oral argument, counsel for the Petitioners admitted that this is a case of first impression, he made that statement in response to a question which assumed that the cases cited in the brief and relating to ordinary parties were not applicable.

Only insofar as the case at bar may be distinguished on the theory that here the Secretary of the Interior seeks a review of the order of the Commission (a distinction without a difference), may it be said to be a case of first impression. As we pointed out, however, to hold that he has no standing would be in conflict with the decision of the Supreme Court in the case of United States v. Interstate Commerce Commission, supra.

If, however, the Secretary of the Interior and the cooperatives are treated in a manner no different from any other litigants, such as private competitors, or as consumers, then there is ample authority for the proposition that they do have standing in Court. Among the cases cited in our reply brief were F. C. C. v. Sanders Bros. Radio Station, supra (for the competitive interest), Associated Industries v. Ickes, supra (for the consumer interest), and Cia Mexicana De Gas v. Federal Power Commission, supra (for the Governmental interest).

11. The Court has correctly observed (p. 6) that, to entitle a party to seek relief in court, there must be a present or threatened invasion of some right or interest. The cases cited by the Court, however, are inapposite.

National Broadcasting Co. v. Federal Communications Commission, 319 U. S. 239, is not authority for the conclusion reached by this Court. It is, rather, authority for the proposition that

both the Secretary of the Interior and the cooperatives are aggrieved parties, since the National Broadcasting Company was held to have such standing, because its competitive interest
81 was adversely affected. In fact the Supreme Court regarded this case as falling within the same category as the Sanders Case, supra.

Alabama Power Company v. Ickes, 302 U. S. 464, did not arise under a statute giving a right to "any party to a proceeding aggrieved by an order" to obtain a review in the Court of Appeals. It was a suit brought to enjoin the Secretary of the Interior, as Administrator of Public Works, from making certain loans under Title II of the National Industrial Recovery Act. The Alabama Power Company had to show more than an adverse effect on its interests. It had to show threatened injury to a legal right; in other words, it had to show legal damage. The Supreme Court distinguished this case from the Chicago Junction Case, 264 U. S. 258, because the latter arose under the Transportation Act of 1920, "and under Sec. 212 of the Judicial Code which gave any party to a proceeding before the Commission the right to become a party to any suit wherein the validity of an order made in the proceeding is involved." For the same reason, the Alabama Power Company case is distinguishable from the case at bar.

In U. S. Cane Sugar Refiners Assn. v. McNutt, 138 F. (2d) 116, petitioners were seeking a review of an order of the Food and Drug Administration, authorizing canners to use dextrose or corn syrup, or both, in combination with sugar, without being required so to state on the label. The petitioners were neither competitors nor consumers, but merely suppliers of an ingredient used in the canning process. They could point to no higher prices which they would have had to pay as a result of the order complained of, or even to a loss of markets previously enjoyed by them. They could show no adverse effect of the order upon them, but, as the Court held, only a "tenuous likelihood" that "the regulation will do away with the remote, speculative sales resistance of the public to the marketing of the canned fruits sweetened in some part with dextrose or corn syrup which might be present if the labels on the cans disclosed, by naming them, that the permitted amounts of one or the other or both sweeteners had been added to the required sugar". Even if the effect were real, it could not be substantial.

82 II. Whether Roanoke-Rapids Has Been Withdrawn From the Licensing Jurisdiction of the Commission

1. We respectfully submit that the Court has erroneously failed to hold that Section 10 of the Flood Control Act of 1944 was so

clear and unambiguous in its effect to reserve the development of the Roanoke River basin for the United States that it required no interpretation. This we have shown on pp. 16–17 of our main brief and p. 32 of our reply brief.

2. Assuming that interpretation was required, we respectfully submit that the Court has not followed the applicable rules of statutory construction. (See our Main Brief pp. 17–42 and our Reply Brief pp. 32–39.)

3. There is one rule of construction which was entirely overlooked by the Court, and that is the proposition that statutes should not be so interpreted as to lead to an unjust result. We did not stress this rule in our brief or argument, because we treated the matter under separate question.

The unjust result in this case is that, if Section 10 of the Flood Control Act of 1944 is so interpreted as not reserving the entire comprehensive plan for development by the United States, then the fruits of the Federal investment in the Buggs Island reservoir would be turned over to a private power company. This fact was recognized by the President's Water Resources Policy Commission in its report, when with reference to the application of the Virginia Electric and Power Company for a license to develop the Roanoke Rapids site that Commission said (Vol. I, p. 238):

"Issuance of such licenses to private power interests would have far-reaching effects upon Federal water resources programs, and more especially upon power policy, an important factor in such programs. Power values created by Federal investment in multiple-purpose programs would be utilized for private profit, instead of bringing about reductions in electric rates and expanded use of electricity."

83 That the surrender of the fruits of the Federal investment to a private power company would be unjust, is best illustrated in a statement made by the President on September 4, the day before the argument in the case at bar, when he said:

"When we produce electric power at Shasta Dam, when we develop the Roanoke Basin in Virginia, it ought to be for the benefit of the people and not for the benefit of the private power companies."

This unjust consequence alone should lead to an interpretation of Section 10 that Gaston and Roanoke Rapids which, as a matter of engineering fact, are powerhouses of the tremendous reservoir created at Buggs Island, have been reserved for development by the United States.

Encouraged by this Court decision, VEPCO has now applied for a license to construct a hydroelectric project at Gaston. As the Secretary stated in his letter to the Solicitor General (Reply Brief p. 66), the net power benefits of the Gaston unit in the comprehen-

sive plan are now estimated at $1,800,000 per year, or $90,000,000 over the usual 50-year period of the license. If a license is granted for this project also, the United States would be deprived of potential net power assets in an amount in excess of $165,000,000 over the 50-year period.

4. The Court rests on the proposition that, under Section 10 (f) of the Federal Power Act, any power benefits flowing from Buggs Island would be returned to the United States through the assessment of headwater benefit payments (p. 19). We respectfully submit that this proposition is erroneous both in theory and in fact.

It is erroneous in theory, because the headwater benefit payments provided for in Section 10 (f) of the Federal Power Act do not contemplate reimbursing the upstream developer for benefits which he would derive from the upstream development by constructing projects downstream, but only for "an equitable" part of operation, maintenance and depreciation in the upstream development. This, as has been indicated by the Commission, cannot be more than the benefits actually conferred on the downstream project. The benefits conferred on the downstream project may be small, yet the benefits lost by the upstream developer may be very great.

84 The proposition is erroneous in fact, because the evidence shows that the net power benefits which the Government would derive from constructing the Roanoke Rapids unit would be in excess of $1,500,000 per year, whereas the headwater benefits, assuming that they had been correctly computed by the Commission, would be not more than $250,000 per year. The net result would nevertheless mean that the United States would be deprived of some $62,500,000 of net power benefits over the period of the license. The loss to the United States and to the people in the area would probably be 2½ times as much, if a license for Gaston were also granted.

These consequences are most unreasonable and unjust. They flow from the Court's conclusion that the Government does not enter upon an improvement, until the specific project unit in a comprehensive plan is "authorized" and construction is actually begun, as was the case of the Clark Hill project which was the subject of decision in the Savannah River Electric Co. v. F. P. C., 164 f. (2d) 408. To the contrary, the flood control acts provide that the Government shall not be deemed to have entered upon an improvement "until it is adopted by law," and the improvement of the Roanoke River basin in accordance with the comprehensive plan was "adopted" by Section 10 of the Flood Control Act of 1944.

5. The Court relies on the rule of statutory construction that "the general language of a statute will not be held to apply to a

matter specifically dealt with" (p. 10). We respectfully submit that this rule has been erroneously applied. Here, by the introductory paragraph of Section 10, Congress "adopted and authorized" the enumerated works of improvement to be prosecuted "in accordance with the plans in the respective reports hereinafter designated." The report designated in the specific provision relating to the Roanoke River basin was House Document 650, 78th Congress, 2nd Session. In that report the entire comprehensive plan was recommended to be adopted as a Federal undertaking for the development of the basin on a *step-by-step* basis, and the construction of Buggs Island and Philpott was recommended as the *initial step* in this development.

85 If there is any question as to whether the purpose of the report was to recommend and the purpose of the statute was to adopt the entire comprehensive plan for Federal development, reference may be made to the testimony of Colonel Goethals at the hearing before the Senate Committee on Commerce, when he referred to the entire plan as *Federal works*, and when in explaining the recommendation with regard to Buggs Island and Philpott he stated that these units were sought to be authorized "at this time". The question and answer were as follows (Hearings on H. R. 4485, 78th Congress, 2nd Session, page 24):

"Senator OVERTON. Are those the only two reservoirs that are recommended to be authorized in this bill?

"Colonel GOETHALS. Those are the only two recommended to be authorized in this bill. The report recommends that Congress approve the general plan of development, but *at this time* authorize only those two reservoirs in the amounts stated." [Emphasis supplied.]

This statement, constituting the purpose of the paragraph relating to the Roanoke River basin, is by far more significant than the testimony of Colonel Gee, some five years after the enactment of the statute, to the effect that the Corps of Engineers have changed their minds and would now recommend a different plan for the Roanoke River basin. His testimony was as follows (Hearings on H. R. 5472, 81st Congress, 1st Session, pp. 137, 152):

"Colonel GEE. * * * Mr. Chairman, I would like to point out at this time that the authorizing of construction on the Smith Mountain project represents a deviation from the original recommendations of the Chief of Engineers when this basin plan was authorized. * * *

* * * * * *

"The CHAIRMAN. All right, we have no recommendation from the Chief of Engineers in this report that Smith Mountain should be the No. 2 unit.

"Colonel GEE. No, sir. However, you have our recommendation as of this morning, that in view of the fact that a private utility company is now seeking to build the Roanoke Rapids Dam, and we believe a similar application will be filed on the Gaston site, that it is our feeling the Federal Government should not attempt to compete and build these straight-power projects.

"The CHAIRMAN. But the fact of the matter is there has been no modification of that report, and that is the statement that you make to the committee in the light of subsequent developments.

"Colonel GEE. Yes, sir."

The cases cited by the Court are clearly inapplicable to the case at bar. In all cases in which it is held that a specific provision will control over a general provision, the reason is that either the specific provision deals differently with the subject matter to which the general rule would be inapplicable, or that the specific matter constitutes an exception to the general rule. In no instance does the specific provision nullify the general rule.

Thus in Ginsberg & Sons v. Popkin, 285 U. S. 204, the question was whether in a bankruptcy proceeding the court could issue a writ of *ne exeat* under Section 2 (15) of the Bankruptcy Act giving the District Court authority to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." This was the general provision which would have permitted the issuance of such writ under Section 261 of the Judicial Code. Section 9 (a) of the Bankruptcy Act, however, contained a general exemption of bankrupts from arrest, and Section 9 (b) contained a specific exception to Section 9 (a) governing arrests and detention of bankrupts about to leave the district in order to avoid examination. In these circumstances the Supreme Court held that Section 2 (15) of the Bankruptcy Act did not limit the exception to the general exemption of bankrupts from arrest. In other words the specific exception to Section 9 (a) governed. The same general principle is to be found in MacEvoy v. United States, 322 U. S. 102, cited by this Court. In neither case did the exception render the general rule ineffective or superfluous.

87 In the case at bar, however, such is the effect of the Court's application of this rule of statutory construction. Here Section 10 provided:

"The following works of improvement * * * are adopted and authorized * * * to be prosecuted under the direction of the Secretary of War * * *"

This is the general provision. The specific provisions which specify "the following works" provide for either (a) authoriza-

tions of appropriations for river basin developments or for specific projects, or (b) authorizations of appropriations in addition to those previously made or (c) modifications of projects previously approved or for which appropriations had been authorized or (d) approvals of comprehensive plans and authorizations of specific dams and reservoirs at estimated amounts. In none of the specific provisions is there any statement that the project or plan of development was "adopted".

Does that mean that the works of improvement specified in the various paragraphs in Section 10 have not been adopted? If that were so, then it would follow that in no part of this section were works of improvement adopted, and the above-quoted language of Section 10 would read as if Congress had enacted:

"The following works of improvement * * * are authorized * * * to be prosecuted under the direction of the Secretary of War * * *."

Such an interpretation would fly in the face of the primary rule of statutory construction that every word in a statute must be given effect and that Congress cannot be presumed to have used superfluous language.

This is especially so, when the words used are the key words of the legislation. In this and in all other flood control acts, there is a definite pattern of legislation. In the provisions, authorizing the Secretary of War to make investigations on streams or at various localities in river basins, Congress provides that the Government shall not be deemed to have entered upon a work of improvement until the proposed work "shall have been
88 adopted by law". Later, when acting favorably upon recommended works of improvement Congress by act provides that such works are "adopted". Since the word "adopted" in the law cannot be said to be without meaning, it can mean only one thing: That the works of improvement are "adopted by law", and hence that the Government must be deemed to have entered upon the improvement.

III. Whether the Commission Was Prohibited from Approving VEPCO's Application by Section 7 (b) of the Federal Power Act

1. The Court, after quoting from the Commission's letter of May 3, 1944, concurring in the recommendations of the Board of Engineers, stated that "the Commission's approval of this sort goes back to the Act of March 3, 1925," and to the 308 reports of the Army Engineers, "since the preparation and submission of such reports was first required by Congress" (p. 20). This basis for the Court's conclusion, that Section 7 (b) did not operate to

prohibit approval of VEPCO's application, is not in accord with the facts as they have actually developed.

To date the Corps of Engineers has issued 195 "308 reports." Only 4 of them were accompanied by letters of the Federal Power Commission concurring in any recommendations. The Act of January 21, 1927 (44 Stat. 1010), authorized surveys in accordance with H. Doc. 308, 69th Congress, 1st Session. From the 70th Congress which began on March 4, 1927, to the 82d Congress, which began on January 3, 1951, the Corps of Engineers issued 1,656 Congressional documents reporting on their investigations and recommending improvements to be undertaken by the Federal Government. Only 42 of these reports contained recommendations of the Federal Power Commission that developments should be undertaken by the United States. The first of such letters from the Federal Power Commission is dated February 7, 1939.

These letters of concurrence followed the enactment of the Flood Control Act of 1938. They constituted the only
89 method by which the Commission, until December 22, 1950,[2] exercised its judgment that water resources for public purposes should be developed by the United States.

2. The Court incorrectly stated (p. 21) our contention with reference to the operation of Section 7 (b). During the oral argument the Court expressly asked whether it was our contention that the letter of March 3, 1944 constituted a recommendation pursuant to Section 7 (b). Our answer was, and this is our contention, that by this letter the Commission expressed its judgment that the development of the water resources of the Roanoke River basin should be undertaken by the United States itself, and that under the wording of the statute it makes no difference whether such judgment is exercised under one section of the Federal Power Act or another.

The statute provides that "*whenever*, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States", the Commission may not approve any application for any project "affecting such development".

3. The prohibition of Section 7 (b) operates, whenever the Commission exercises such judgment, against approval of applications for projects "affecting such development." It was, therefore, important to show that the proposed project would adversely affect such Federal development. The facts pertaining to this effect are set forth on pp. 49–61 of our main brief. One of the adverse effects on the comprehensive plan is to reduce the

[2] On that day the Commission issued an order denying a license to the New York Power Authority for the construction of the St. Lawrence river project, assigning as a reason that in the judgment of the Commission these water resources should be developed by the United States itself.

benefit-cost ratio of the plan from 1.47 to 1.34, which represents a reduction in net power benefits of $1,518,000 per year. While not in the amount stated, the adverse effect was conceded by VEPCO's Exhibit 53. Here, again, the Court incorrectly stated (p. 22) our contention with reference to the benefit-cost
90 ratio of the comprehensive plan. Our contention is that this fact, in view of the judgment expressed by the Commission, invokes the prohibition of Section 7. (b). It is not within the Commission's wisdom or discretion to override the law.

4. We respectfully submit that the Court erred in holding (p. 21), that, even if the Commission's letter of May 3, 1944, constituted a recommendation under Section 7 (b), the Commission was not precluded from approving the application under Section 4 (e), since such recommendation was made in 1944, and "Congress has taken no action in the meantime except with respect to the Buggs Island and Philpott projects."

Congress did take action with reference to the entire plan. Its approval of the plan cannot be treated as being "no action" at all. Whether the Congressional approval did or did not mean that the comprehensive river basin development has been adopted by Congress, this much is certain: (a) The Commission, by concurring in the recommendations of the Board of Engineers for Rivers and Harbors, induced the Chief of Engineers to make his findings and recommendations; (b) the Chief of Engineers so stated in his report to Congress, and recommended that the approval of the plan should take the Commission's recommendations into consideration; (c) Congress acted favorably upon the recommendation made by the Chief of Engineers, which means that Congress also was induced to do so by the Commission's concurrence in the plan. In view of these facts, it does not lie within the Commission's power or discretion to nullify its previous recommendation and the Congressional action therewith.

In this respect the case is not distinguishable from Savannah River Electric Co. v. Federal Power Commission, 164 F. (2d) 408. The fact that in the case of the Clark Hill project the construction was later "authorized" and work was commenced, is immaterial to the question whether an administrative agency may within the limits of its discretion induce action by Congress and then reverse its decision, in effect nullifying such action.

91 IV. WHETHER THE COMMISSION EXCEEDED ITS AUTHORITY UNDER THE FEDERAL POWER ACT

In this part of the opinion the Court states (pp. 22–3) that the petitioners contend that the Commission transcended its authority or abused is discretion—

"(a) because the project license did not conform to the general plan as approved in the Flood Control Act of 1944; (b) because the Roanoke Rapids project was not economically feasible for private development; and (c) because the granting of a license involved the surrender to private interests of valuable public power rights."

Except for the proposition that VEPCO's proposed project is not economically feasible for private development, the above is not a correct statement of our contentions.

(A) WHETHER THE PROJECT LICENSE DID NOT CONFORM TO THE GENERAL PLAN AS APPROVED BY CONGRESS

Nothing stated in the opinion on this subject (p. 23) reflects any contention on our part. We did not raise any question concerning the deviation of the proposed project from any minor details of the corresponding project unit in the comprehensive plan. We did contend that the proposed project deviated from the Roanoke Rapids unit in H. Doc. 650 in that the owning or operating agency of the project was changed from Federal to non-Federal. Who should own and operate this project is not a minor detail. Furthermore, this question was raised in connection with our contention that the Commission had no jurisdiction, not in connection with any contention that the Commission did not properly exercise its powers under the Federal Power Act.

Our first two contentions under the question whether the Commission properly exercised its authority under the Federal Power Act, were as follows:

(i) Assuming that, by its approval of the comprehensive plan, Congress did not reserve the development of the water resources of the Roanoke River basin for the United States itself,
92 but merely adopted the finding of the Chief of Engineers that the comprehensive plan "provides for the optimum development of the water resources of the basin," such finding was conclusive on the Commission in determining whether VEPCO's proposed project was "best adapted" to a comprehensive plan for the development of the stream for the purposes of navigation, power development and other beneficial public uses. The Court did not consider this contention.

(ii) Another contention which was not considered by the Court was that in determining whether VEPCO's proposed project was "best adapted" to a comprehensive plan for water power development, as required by Section 10 (a) of the Federal Power Act, it was incumbent on the Commission to weigh the desirability of a single project as against a river basin development. This the Commission did not do.

(B) WHETHER THE PROPOSED PROJECT IS ECONOMICALLY FEASIBLE

After stating the Commission's conclusion as to the economic feasibility of the proposed project was based upon expert testimony, the Court stated our contention as follows (p. 24):

"Petitioners attack this testimony with arguments based on isolated portions of the testimony of some of the experts; * * *"

We respectfully submit that this is an incorrect statement of the petitioners' contention. To the contrary, our attack was not on the testimony at all, but on the Commission's conclusion, because it was not supported by any evidence. For the purpose of this contention we adopted all the facts presented by the expert witnesses, especially VEPCO's Exhibits 15 and 28, upon which the Commission based its conclusion. Granted (i) that the excess annual cost of steam over hydro under regulated flow conditions is $400,000 (Exhibit No. 15), and (ii) that the excess annual cost of steam over hydro under natural flow conditions would be $150,000 (Commission's Finding No. 32), does the difference between the two figures represent the headwater benefits actually conferred by the Buggs Island reservoir on VEPCO's proposed project (Commission's Finding No. 34)?

93 We submit (i) that the difference between the two figures does not represent the headwater benefits at all and (ii) that the Commission's Finding No. 34 is not supported by any evidence.

(i) The Commission found (Finding No. 31) that the annual energy contribution of the Buggs Island reservoir would be 70,000,000 kwh. This finding is based on Exhibits 15 and 28 which show that this would be on-peak energy (see our main brief, p. 85). The question presented is: What would be the cost of obtaining 70,000,000 kwh. of on-peak energy from some other source?

If the difference between the excess annual costs of steam over hydro (i. e., as between the project operated under regulated conditions and the project operated under natural flow conditions) represented the cost or value of the 70,000,000 kwh., then it would follow that if the difference were $150,000, VEPCO could obtain 70,000,000 kwh. of on-peak energy from some other source at this figure; and if the difference were only $50,000, then VEPCO could obtain 70,000,000 kwh. of on-peak energy from some other source at such cost. In other words, the more feasible the hydro project under natural flow conditions, the less would it cost VEPCO to obtain 70,000,000 kwh. of on-peak energy from some other source. This is the *reductio ad absurdum*.

(ii) The Commission realized that it had to make a finding as to the cost of 70,000,000 kwh. to VEPCO from a steam plant. This the Commission did in Finding No. 33 which reads as follows:

"The 70,000,000 kw-h. of additional average annual energy which may result from storage regulation by Buggs Island would cost the applicant about $250,000 if obtained from a steam plant." This finding, however, is not supported by any evidence. There is not a single line of testimony in the entire record that VEPCO could obtain 70,000,000 kwh. of on-peak energy from a steam plant for about $250,000 or approximately 3.5 mills per kwh.
94 The only evidence in the record as to the cost of on-peak energy to VEPCO is contained in the testimony of Mr. Holtzclaw, namely that VEPCO paid 9.8 mills per kwh. This would amount to $686,000, not $250,000 per year.

Thus our contention does not constitute an attack on the testimony, as the Court stated, but is based on the proposition that there is not a scintilla of evidence to support Finding No. 33 and that, therefore, Finding No. 34 which is an inference derived from Finding No. 33, must likewise fall.

Our second contention, with respect to this figure of $250,000, is that the finding does not meet the standards set forth in Section 10 (f) of the Federal Power Act, and is therefore invalid. United States v. Baltimore & Ohio Railroad Co., 293 U. S. 454, 462–5; Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80, 87–88.

(C) WHETHER THE GRANT OF THE LICENSE RESULTED IN SURRENDER OF PUBLIC ASSETS

It is our contention that, by granting a license for Roanoke Rapids, the Commission was depriving the United States of valuable assets. This contention, however, went to the Commission's jurisdiction, not to the proper exercise of power within the framework of the Federal Power Act.

Our further contention on the question whether the Commission properly exercised its authority under the Federal Power Act was that the license issued is not in the public interest, and that the Commission failed to weigh the interests of the consumers and the general public against the interests of VEPCO and its investors.

It is not feasible, in a petition for rehearing, to go into all the details of the opinion. However, we feel that it is our obligation to invite the Court's attention to one erroneous statement which, we feel certain, was not intended. The Court stated (pp. 27–8):

"The annual value of its (the project's) capacity and energy will be around $400,000 over and above annual costs."

This would make it appear that VEPCO was prepared to operate the project on a return of 1½%, whereas the "costs",
95 as shown in Exhibit 15, already include a return of $1,604,-

000, as compared with a return of $815,000 for the "equivalent steam program."

For the reasons stated above, we respectfully submit that the petition for rehearing should be granted.

We are authorized to say that counsel in No. 6274, Virginia REA Association et al. v. Federal Power Commission et al., joins in this petition for rehearing.

GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the Relation of Oscar L. Chapman, Secretary of the Interior.

CERTIFICATE OF COUNSEL

This is to certify that the above petition for rehearing is filed in good faith and not for the purpose of delay.

GREGORY HANKIN.

OCTOBER 30, 1951.

96 *Order denying rehearing*

[Filed and Entered November 5, 1951.]

United States Court of Appeals for the Fourth Circuit

No. 6273

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

This Court having at its October term, 1951, rendered its decision denying the petition to set aside the order of the Federal Power Commission in this cause, and the petitioner having on October 30, 1951, filed a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied.

November 5th, 1951.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

November 12, 1951, certified copy of the decree is transmitted to the Federal Power Commission.

97 Proceedings in the United States Court of Appeals for the Fourth Circuit

No. 6274

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

April 27, 1951, petition for review is filed and the cause is docketed.

NOTE.—The petition for review appears at Page 33 of Part I of Petitioners' Appendix and is, therefore, omitted here.

April 27, 1951, notification of the filing of the petition, together with a copy of the petition for review, mailed to Federal Power Commission at 1800 Pennsylvania Avenue, Washington, D. C., and Virginia Electric and Power Company at Electric Building, Richmond, Virginia.

April 30, 1951, the appearance of T. Justin Moore and Patrick A. Gibson is entered for the Respondent, Virginia Electric and Power Company.

May 2, 1951, the appearance of Bradford Ross, General Counsel, and Willard W. Gatchell, Assistant General Counsel, is entered for the Respondent, Federal Power Commission.

May 3, 1951, the appearance of Robert Whitehead is entered for the Petitioners.

May 5, 1951, transcript of record is filed.

Motions for continuance, enlargement of time for designation of parts of record to be printed, and permission to file brief in excess of 50 pages

98 [Filed May 9, 1951.]

NOTE.—These motions appear at Page 2 and, therefore, are omitted here.

Motion of Carolina Power and Light Company to intervene

[Filed May 10, 1951.]

NOTE.—This motion appears at page 15 and is, therefore, omitted here.

Statement on motion for continuance, and motion for consolidation of causes and for permission to file enlarge brief

[Filed May 11, 1951.]

NOTE.—This statement appears at Page 18 and is, therefore, omitted here.

Argument of cause on motion to continue

May 11, 1951 (Special May term, 1951), cause came on to be heard, together with No. 6273, on the motion for continuance, etc., before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Order continuing causes, etc.

[Filed and Entered May 11, 1951.]

NOTE.—This order appears at Page 21 and is, therefore, omitted here.

Motion of Appalachian Electric Power Company for leave to intervene

[Filed May 18, 1951.]

NOTE.—This motion appears at Page 23 and is, therefore, omitted here.

Order amending order of May 11, 1951

[Filed May 21, 1951.]

NOTE.—This order appears at Page 36 and is, therefore, omitted here.

Petitioners statement on the petition of the Carolina Power and Light Company and the Appalachian Electric Power Company for leave to intervene

99 [Filed May 22, 1951.]

NOTE.—This statement appears at Page 37 and is, therefore, omitted here.

Notice of Motion of Appalachian Electric Power Company

[Filed May 23, 1951.]

NOTE.—This notice appears at Page 38 and is, therefore, omitted here.

Notice of Motion of Carolina Power and Light Company

[Filed May 23, 1951.]

NOTE.—This notice appears at Page 40 and is, therefore, omitted here.

Argument on motions to intervene

June 11, 1951 (June term, 1951), cause came on to be heard, together with No. 6273, on the motions to intervene, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Order granting motions to intervene

[Filed and Entered June 11, 1951.]

NOTE.—This order appears at Page 41 and is, therefore, omitted here.

June 14, 1951, the appearance of Charles F. Rouse is entered for the Carolina Power and Light Company, Intervener, Respondent.

June 16, 1951, the appearance of Herbert B. Cohn is entered for the Appalachian Electric Power Company, Intervener, Respondent.

June 18, 1951, the appearance of David W. Robinson is entered for the Carolina Power and Light Company, Intervener, Respondent.

July 9, 1951, brief of petitioners is filed.

July 31, 1951, brief Carolina Power and Light Company, Intervener, Respondent, is filed.

August 1, 1951, brief Federal Power Commission, brief Appalachian Electric Power Company, Intervener, and brief and appendix of Virginia Electric and Power Company, Respond-
100 ents, are filed.

August 15, 1951, reply brief of petitioners is filed

Argument of cause

September 5, 1951 (Special September term 1951), cause came on to be heard, together with No. 6273, before Parker, Soper and

Dobie, Circuit Judges, and was argued by counsel and submitted.

September 18, 1951, Part III of Appendix to Petitioners' Brief is filed.

Opinion

[Filed October 1, 1951.]

NOTE.—The opinion appears on Page 44 and is, therefore, omitted here.

Decree

[Filed and Entered October 1, 1951.]

United States Court of Appeals for the Fourth Circuit

No. 6274

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

This cause came on to be heard on the petition to review and set aside the order of the Federal Power Commission, and on the transcript of the record from the said Federal Power Commission, and was argued by counsel.

101 On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the petition to set aside the order of the Federal Power Commission in this cause, be, and the same is hereby, denied.

October 1st, 1951.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

102 *Petition for Rehearing of Virginia REA Association, et al.*

United States Court of Appeals for the Fourth Circuit

Nos. 6273 and 6274

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

AND

VIRGINIA REA ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Robert Whitehead, Lovingston, Virginia, Attorney for Petitioners. Whitehead & Marshall, Lovingston, Virginia, of Counsel.

[Filed Oct. 26, 1951. Claude M. Dean, clerk.]

103 United States Court of Appeals for the Fourth Circuit.

Nos. 6273 and 6274. United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior, Petitioner, v. Federal Power Commission and Virginia Electric and Power Company, Respondents and Virginia REA Association, et al., Petitioners, v. Federal Power Commission and Virginia Electric and Power Company, Respondents. Petition for Rehearing of Virginia REA Association, et al.

Come now the Virginia REA Association, Mecklenburg Electric Cooperative, Southside Electric Cooperative, Community Electric Cooperative, Prince George Electric Cooperative, Central Virginia Electric Cooperative, Virginia Electric Cooperative, Northern Neck Electric Cooperative, Northern

104 Piedmont Electric Cooperative, Shenandoah Valley Electric Cooperative, B-A-R-C Electric Cooperative and Craig-Botetourt Electric Cooperative, petitioners in No. 6274, and, pursuant to Rule 19 of the Rules of this Court, petition this Honorable Court for a rehearing. As reasons therefor they hereby adopt as their own and incorporate herein by reference the petition for a rehearing of the United States of America on the relation of Oscar L. Chapman, Secretary of the Interior. This is done to avoid repetition and duplication and to prevent an unnecessary extension of the record.

However, petitioners desire to supplement the aforesaid petition in one respect.

In its opinion the Court stated (p. 6):

"A fortiori the cooperative association, whose only possible interest is to purchase power which the Secretary may sell, has no such right, duty or responsibility with respect to the construction of a power project as would give it standing in court to question an order of the Commission."

This conclusion is clearly erroneous. These petitioners have an interest which is directly affected by the withdrawal of the Roanoke Rapids site from the comprehensive plan for the development of the Roanoke River Basin.

No one will deny that power can and will be developed at that site cheaper than any other site in the whole river basin. It is the prime power site.

The retention of the site in the comprehensive plan of development means lower power production costs and therefore cheaper rates to consumers. Its withdrawal means higher power production costs and therefore higher rates to consumers. Petitioners, as consumers of the power to be produced, have a direct in-
105 terest in what the power will cost. But they are not mere ordinary consumers, vested only with the rights which ordinary consumers have. Under the Flood Control Act of 1944, whereby the development of the Roanoke River Basin was authorized, they, along with public bodies, have a "preference" in the sale of the power and energy to be generated in the basin development and at each site in the basin. They and public bodies have the first claim to, and a prior right on, such power and energy.

How can they exercise the right, how can they obtain the benefits which the Congress plainly directed should be theirs, if the site is withdrawn from the comprehensive plan of Federal development and no public power is produced there?

To hold that they are not "aggrieved" by this mutilation of the plan for the comprehensive development of the Roanoke River Basin by the United States, whereby the ratio of benefits to costs is appreciably decreased, is simply to ignore the realities of the situation.

Under the Court's conclusion, all these petitioners can do is to stand on the sidelines, helpless and mute, and watch the power company take away from them and acquire for itself the first right to the power to be produced at the Roanoke Rapids site. That, in effect, is what the Court has held.

It has ignored their status not only as consumers, but as competitors. Their status was clearly set forth in their petition for review (Petitioner's Appendix I, page 33). It is recognized by law. It is recognized in the Rules of Practice and Procedure of

the Federal Power Commission (Section 1.8, p. 109), wherein, in defining an interest that may be directly affected, it is said: "the following may have such an interest: consumers served by the applicant, defendant or respondent; * * * and competitors of the applicant, defendant or respondent."

As petitioners read the Court's opinion, if the Federal Power Commission decides to license a project, even though the Court be of the opinion that its power to do so has been
106 plainly denied by the Congress, there is no "aggrieved" person or party who can question the order on a petition for a review. If this conclusion is correct, then the right of review provided by law cannot be exercised, even by those whose financial interests are adversely affected.

The right of judicial review of orders of administrative agencies is a cherished right in our system of jurisprudence. It should not be lightly denied. It should not be whittled away by narrow and technical constructions.

Respectfully,

VIRGINIA REA ASSOCIATION,
MECKLENBURG ELECTRIC COOPERATIVE,
SOUTHSIDE ELECTRIC COOPERATIVE,
COMMUNITY ELECTRIC COOPERATIVE,
PRINCE GEORGE ELECTRIC COOPERATIVE,
CENTRAL VIRGINIA ELECTRIC COOPERATIVE,
VIRGINIA ELECTRIC COOPERATIVE,
NORTHERN NECK ELECTRIC COOPERATIVE,
SHENANDOAH VALLEY ELECTRIC COOPERATIVE,
B-A-R-C ELECTRIC COOPERATIVE, AND
CRAIG-BOTETOURT ELECTRIC COOPERATIVE, AND
NORTHERN PIEDMONT ELECTRIC COOPERATIVE,
By ROBERT WHITEHEAD,
Lovingston, Virginia, Their Attorney.

WHITEHEAD & MARSHALL,
Lovingston, Virginia,
Of Counsel.

CERTIFICATE OF COUNSEL

This is to certify that the above petition for rehearing is filed in good faith and not for the purpose of delay.

ROBERT WHITEHEAD.

107 *Order denying rehearing*

[Filed and Entered November 5, 1951.]

United States Court of Appeals for the Fourth Circuit

No. 6274

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY; CAROLINA POWER AND LIGHT COMPANY, AND APPALACHIAN ELECTRIC POWER COMPANY, INTERVENERS, RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

This Court having at its October term, 1951, rendered its decision denying the petition to set aside the order of the Federal Power Commission in this cause, and the petitioners having on October 26, 1951, filed a petition for a rehearing of the said cause, and the same having been carefully considered;

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied.

November 5th, 1951.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

November 12, 1951, certified copy of the decree is transmitted to the Federal Power Commission.

108 In the Supreme Court of the United States

October Term, 1951

Nos. — and —

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

AND

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petitions for writ of certiorari the printed record may consist of the following:

1. Appendix to brief for the Petitioners.
2. Appendix to brief for respondent, Virginia Electric and Power Company.
3. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioners will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court of the United States a complete certified record on appeal in the United States Court of Appeals for the Fourth Circuit; and that, in the
109 event the petitions for writ of certiorari are granted, the printed record shall consist of the proceedings in the court below and such portions of the complete record on review in that court as the parties may designate.

It is further stipulated and agreed that the parties hereto may refer in their briefs to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

GREGORY HANKIN,
Counsel for Petitioner, United States of America, on the Relation of Oscar L. Chapman, Secretary of the Interior.

ROBERT WHITEHEAD,
Counsel for Petitioners, Virginia REA Association et al.

BRADFORD ROSS,
Counsel for Respondent, Federal Power Commission.

Signed for Virginia Electric and Power Company without waiver of or prejudice to any objection by it as to the standing of any party or as to want of authority to petition in this matter in this Court or in the United States Court of Appeals for the

Fourth Circuit on behalf of or in the interest of the United States:

T. JUSTIN MOORE,
Counsel for Respondent,
Virginia Electric and Power Company.

110 *Clerk's certificate*

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Court of Appeals for the Fourth Circuit, do certify that the foregoing, in five volumes, is a true copy of the appendix to brief for the Petitioners, Appendix to brief for Respondent, Virginia Electric and Power Company and the proceedings in the said Court of Appeals in the therein entitled causes, as the same remain upon the records and files of the said Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Court of Appeals in said causes, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on applications for writs of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 28th day of February A. D. 1952.

[SEAL] (S) CLAUDE M. DEAN,
Clerk of the United States Court of Appeals for the Fourth Circuit.

Supreme Court of the United States

No. —, October Term, 1951

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY,

VIRGINIA REA ASSOCIATION ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY

ORDER

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petitions for writs of certiorari in the above-entitled causes be, and the same is hereby, extended to and including April 1st, 1952.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 29th day of January 1952.